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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1943

■

Number 886-887

CHARLES MILBURN CLAYTON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

■

Number

THOMAS HOWARD STULL, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

■

ON PETITIONS FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners' BRIEF IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI

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Preliminary

For a statement showing the opinions of the court below, the basis on which the jurisdiction of this court is claimed, the questions presented, the history of the actions, how the issues were raised, the evidence received and rejected and the assignments of error relied upon a reference is here made to each petition for writ of certiorari and

such is incorporated herein as though copied at length herein.[1]

The Causes Are Not Moot

Release of the petitioners from custody after the expiration of ten days from the date of judgment and sentence does not make the appeal immediately taken from the judgment moot where the disabilities of the conviction continue and each petitioner did not voluntarily waive the rights of appeal by electing to serve the sentence because bail could not be obtained pending an appeal from the judgments.

The decision of this honorable appellate court in *St. Pierre* v. *United States,* 319 U. S. 41, does not support the suggestion of the government that the cause is moot. In that case there was not involved a criminal conviction for misdemeanor or felony. It involved the validity of a finding that the appellant was guilty of contempt of court in refusing to testify before a grand jury.[2] The only penalty or disability that he suffered was the imprisonment. He did not suffer any attainder of citizenship rights by the imprisonment for contempt. In that case the court specifically held that no "further penalties or disabilities can be imposed on him as a result of the judgment which has now been satisfied." Furthermore the record in the cases at bar affirmatively shows that it was impossible to have brought the case before this court or the United States Supreme Court for review before the expiration of the ten-day sentences imposed against petitioners. In the *St. Pierre* case it is said, as grounds for holding the

[1] See the petition for writ of certiorari in the *Clayton* case pp. 1-17; and in the *Stull* case at pp. 1-14.

[2] It is fundamental that proceedings for contempt are not criminal proceedings. The offender is not entitled to trial by jury or any of the specific guarantees which the law secures for defendants in criminal proceedings. *Meyers* v. *United States,* 264 U. S. 95; *In re Debs,* 158 U. S. 564.

appeal moot, "It does not appear that petitioner could not have brought his case to this court for review before the expiration of his sentence."

The language of the court in the *St. Pierre* case, to wit, "The moral stigma of a judgment which no longer affects legal rights does not present a case or controversy for appellate review," is in effect a holding by the court that the effect of the conviction of each petitioner of the offense of felony upon their legal, citizenship and civil rights is sufficient to deny a review of the conviction since the release of the petitioners.

In the case at bar, in addition to the "moral stigma", "further penalties or disabilities" have been inflicted by the judgment of conviction upon each petitioner, together with the sentence imposed. Each petitioner's conviction of an offense of a felony produces certain consequences which do not result from a punishment of one for contempt of court or a conviction of a misdemeanor. Certain penalties and disabilities have been suffered. Each petitioner has lost his civil rights and citizenship rights, which are valuable legal rights that keep the cause alive for the purposes of decision regardless of serving the time. Each petitioner has lost his right to seek and hold a public or political office. The right to vote and to travel under an American passport has been forfeited. If married the conviction would be grounds for legal separation or divorce in some states. In some jurisdictions one convicted of a felony is considered as incompetent to testify. There are many other disabilities that flow from such convictions which are too numerous to mention here, but which the court will judicially notice.

A more serious problem also presents itself. Each petitioner is a "first offender" under the criminal laws of the federal and state government. Many jurisdictions have in full force and effect *habitual offenders* statutes. Under these statutes a person is subject to punishment

as a *habitual offender* when it is shown that he has been convicted of two or more felonies. The state of West Virginia has such a statute which has been upheld by the Supreme Court of the United States. (*Grayam* v. *West Virginia,* 224 U. S. 616) The offense of which each petitioner has been found guilty, and which he claims to have been reached in violation of the Constitution, will make him subject to incarceration under the habitual offender statutes in event he is found to subsequently violate any felony statute.[3]

The disabilities and penalties which flow from a conviction of a felony have been recognized as extended beyond the term of the sentence imposed and to subsist regardless of whether the judgment has or has not been satisfied. Accordingly the courts have held that pardon, in the absence of a reversal of the conviction by a court, is the only effective means of removing the blight and forfeiture that comes through conviction of a felony. (*Ex parte Garland,* 4 Wall. 333; *Osborne* v. *United States,* 91 U. S. 474; and *Knote* v. *United States,* 95 U. S. 149) Hence pardon has been held to make a felon a "new man", restore him to his citizenship and civil rights, give him a "new credit" and remove from him the penalties and disabilities. It is because of the penalties and disabilities which flow from the conviction that the pardon has been held to work against the crime rather than the sentence or judgment of conviction. (*Illinois Central Ry. Co.* v. *Bosworth,* 133 U. S. 92; *Ex parte Garland,* 4 Wall. 333)

"The term 'felony', in the general acceptation of the common law, comprised every crime which at common law occasioned a total forfeiture of lands or goods, or

[3] It should be observed that there is nothing to prevent the draft boards' having jurisdiction over each petitioner to issue new orders to report for induction and if petitioners fail to comply therewith that each could again be prosecuted under the Act and thus become a second offender. The United States District Courts have so construed the Act in many cases which are unreported. A few of these are on appeal to the Circuit Courts of Appeals.

both, and to which might be superadded capital or other punishment according to the degree of guilt." (16 C. J., p. 55; see, also, 22 C. J. S., p. 55) "By some statutes all crimes which are punishable by imprisonment in the state prison or penitentiary, with or without hard labor, are felonies." (16 C. J., p. 56; 22 C. J. S., p. 56; *United States* v. *Staats,* 8 How. 41; *United States* v. *Sutton,* 47 F. 129; *United States* v. *Smith,* 40 F. 755; *United States* v. *Kelly,* 51 F. 2d 263, rev. on other grounds, 55 F. 2d 67) The Criminal Code, s. 335 (18 U. S. C. s. 541) expressly so provides. In *Brede* v. *Powers,* 263 U. S. 4, at page 10, the court said: "Or, to put it as counsel puts it, 'The construction of the Fifth Amendment to the Constitution is this: An infamous crime is one that carries infamous punishment; the test does not depend upon the punishment that ultimately happens to be inflicted, but upon the punishment the court *has power* to inflict.'"

Whatever may be the rule in cases involving misdemeanors, it is certain that justice does not permit the dismissal of the appeal from a felony conviction because the litigant has served "his time". The serving of the sentence in such case does not remove the stigma and attainder that follow a conviction for a felony. Here in each case, the petitioner, because of conviction, is denied his rights of citizenship, which is a loss of substantial rights far more valuable to him than money. These rights can only be restored by a pardon or a reversal. It would result in irreparable injury to deny a review or a judicial erasing of the blot upon his character, name and rights by invoking such a technical rule of procedure. If permitted at all, the doctrine should be confined to the cases of misdemeanors and under no circumstances be extended to the cases involving felony convictions. Were it otherwise, the innocent could be framed, convicted and denied review of unrighteous judgment by a short sentence which would

be served before the case could be reached for decision in an appellate court.

Under the common law it was uniformly held that the death of an apprehended felon or of one convicted of treason did not make void the appeal or deny the right of a review. In such cases the heirs were given the right to prosecute the appeal so as to remove the blight of attainder which forfeited their citizenship and property rights.[4] Reason and justice dictate that the same rule should prevail here so as to avoid an injustice and illegal and irreparable attainder of the citizenship rights of each petitioner because of the conviction entered against him, and to permit him the right to show that he is not guilty of the offense and that the conviction is void because of the unconstitutionality of the trial and the construction of the criminal sanctions clause of Section 11 of the Selective Training and Service Act of 1940.

By force of the same reasons, where the sentence has been unwillingly and involuntarily served under a judgment based upon a trial and statute which are claimed, as here, to violate the Constitution it must be held that the attainted one is entitled to judicial appellate review pursuant to the statutes, rules and decisions of the court, and that such right is not waived by serving the sentence.

Bergdoll v. *United States,* 279 F. 404, cited by the Government, is not in point. In that case the stay of judgment prayed for by defendant was granted pending the appeal. Without compulsion the appellant voluntarily abandoned the appeal by willingly paying the fine provided as an alternative in the judgment; however, the appellant stated the fine was paid under protest and that she was reserving the right to contest the conviction on appeal.

[4] See 3 American Jurisprudence, p. 311. In *O'Sullivan* v. *People,* 144 Ill. 604, 32 N. E. 192 (1892) it is said: "And it was held that a writ of error may be brought by the party attainted, 'or after his death, by his heirs or executors, to reverse an attainder of treason or felony, but no other persons, whatever interest they may claim in the reversal.' 1 Chitty, Criminal Law, 746, 747."

Here there was no alternative or willing payment of a fine. There was no alternative fine in either of the cases now before this court. The petitioners here attempted to obtain release on bail pending appeal and protested against the satisfaction of the judgment prior to determination of their appeal. Each appealed immediately upon the rendition of the judgment. Neither one waited until the term was being served before taking appeal. They were taken to the county jail by the marshal after filing their notice of appeal and requesting bail.[5] The *Bergdoll* case does not control here, as there was no alternative judgment and no voluntary payment of the fine or willing entry upon the service of the sentence. In the *Bergdoll* case the court said: "But this situation—one where the defendant was at liberty and under bail to await the judgment of this court and under no duress or compulsion of the lower court's sentence—she has voluntarily seen fit to change by satisfying, once and for all, the judgment of the court below . . . and, having thus voluntarily ended the case herself, she ended her right, and this court's power to pass on questions of error which have now become of no judicial effect, so far as concerns the satisfied sentence of the court below." The denial of certiorari (259 U. S. 585) does not mean that such case was made authority to dispose of a case like this where the facts are different. Moreover, even if the facts were the same, there is doubt that such action would control the disposition of the case here; because such "denial of a writ of certiorari imports no expression of opinion upon the merits of the case, as the bar has been told many times." (*United States* v. *Carver,* 260 U. S. 482, 490)

The cases holding appeals moot because of voluntary payment of a fine do not apply because here the serving

[5] See the affidavits filed in the court below in support of petitioners' memorandum in opposition to the Government's motion to dismiss the appeal because moot.

of the sentence was not voluntary, but compulsory. Moreover, there is respectable authority that payment of the fine does not make the appeal moot.

Hartwell v. *United States,* 107 F. 2d 359, 360, where, in overruling the motion to dismiss the appeal, it was said that "the payment of the fine was not, and did not work, an abandonment of the appeal". Compare *Merriam* v. *Hass,* 3 Wall. 687; *United States* v. *Daskiel,* 3 Wall. 688, 697-702; *Korematsu* v. *United States,* 319 U. S. 432.

There is a division of authority among state court decisions[6] as to whether voluntary payment of the fine makes the case moot. Several courts take the view that payment does not make the appeal moot. *State* v. *Winthrop,* 148 Wash. 526, 269 P. 793; *People* v. *Bondy,* 239 Ill. App. 273; *In re Hershey Farms,* 24 N. Y. Supp. 2d 163, 175 Misc. 641; and *People* v. *Chamness,* 109 Cal. App. 778, 288 P. 20, where a fine was involuntarily paid to avoid the alternative of serving a sentence in jail. The court said: "It is to substitute fantasy for fact to say the defendant's real interest in the case ceases with the payment of the fine. Is a good name no longer to be chosen rather than riches? Is a question alive as long as the payment of $100 is involved, but moot when only the matter of a besmirched name remains?"

It is uniformly the rule that the right of judicial review on appeal is not waived by compliance with a judgment of conviction for a crime, by pleading guilty and paying the fine or serving the sentence, where it is claimed the acts committed do not constitute a violation of any law, the indictment does not allege an offense under the law, or the statute is unconstitutional. *United States* v. *Ury,* 106 F. 2d 28; *Roberts* v. *United States,* 60 F. 2d 774; *Forthoffer* v. *Swope,* 103 F. 2d 707.

It should be noted that here petitioners are attacking

[6] For a collation of the conflicting cases on this and related questions see 74 ALR 641 and 18 ALR 873.

the Criminal Sanctions Clause and the Selective Service Regulations as being unconstitutional.

On the question presented as to serving of sentence causing appeal to become moot there are but few decisions.

In *Roby* v. *State* (1897,) 96 Wisc. 667, "It appears by the record that the plaintiff in error was sentenced to one year's imprisonment in May, 1896, and consequently that his term must now have expired. This fact, however, makes no difference with the disposition of the case. A person convicted of crime may prosecute his writ of error while serving his sentence, and the fact that he may serve out his entire sentence before the decision of his case does not affect his right to a reversal of the judgment if it be erroneous. . . . the compulsory working out of a judgment in a criminal case does not debar a man from obtaining a reversal of an erroneous conviction, and thus removing the stigma which wrongly rests on his name and reputation."

See, also, *Com.* v. *Fleckner* (1896), 167 Mass. 13, 44 N. E. 1053; *State ex rel. Lopez* v. *Killigrew,* 202 Ind. 397, 174 N. E. 808; *State* v. *Cohen,* 45 Nev. 266, 201 P. 1027, reaching the same conclusions as above decision.

Before concluding this discussion it is necessary to consider some of the other cases relied upon by the government in the Circuit Court of Appeals. It is noticed that *O'Hara* v. *MacConnell,* 93 U. S. 651, a civil action, actually supports the position taken by petitioners. So also does *Josevig-Kennecott Copper Co.* v. *Howarth Co.,* 261 F. 567. The cases of *Mills* v. *Green,* 159 U. S. 651, and *Brownlow* v. *Schwartz,* 261 U. S. 216, do not support petitioners here because these two cases are not in point. The *Mills* case is a civil action involving the right of appellant to vote at an election. At the time the appeal was heard the election had been held. In the *Brownlow* case the action was for mandamus to compel the issuance of a building permit. The permit was issued pending the appeal which terminated the controversy and settled all legal rights of the parties. In

connection with these two cases the court should compare *Federal Trade Commission* v. *Goodyear Co.*, 304 U. S. 257, 260, where the commission's order involved had been revoked pending appeal, and *Southern Pacific Terminal Co.* v. *Interstate Commerce Comm.*, 219 U. S. 498, 514-527, in which the commission's order had expired by its terms at the time the appeal was heard. In these two cases the court held that the appeals were not moot.

Cheong Ah Moy v. *United States*, 113 U. S. 216, involved the right of an alien, not claiming to be a citizen, to the right to writ of habeas corpus. The petitioner had been taken from the country and the respondent no longer had custody of the prisoner at the time the appeal was heard. *Ex parte Baez*, 177 U. S. 378, was an original action for writ of habeas corpus incidental to a petition for writ of certiorari.[7] Also pending a determination the restraint of the prisoner had terminated and at the time of the hearing the respondent did not have custody of the petitioner. In both these cases the court held the issues to be moot. Habeas corpus cases are civil actions and differ from the appeal in criminal cases in that the life of the case is actual restraint of the prisoner which is the only issue in the controversy, that is to say, Is the *restraint* of the petitioner illegal? Decisions in civil actions and in habeas corpus cases where the appeals have been held moot because of satisfaction of the judgment are not in point or decisive of appeals from felony convictions where the accused has served the sentence and is at liberty because the appellate court still has jurisdiction to pass upon the other legal rights of the accused affected by the judgment of conviction in addition to whether the restraint is illegal.

The case of *United States* v. *Wittmeyer*, 89 F. 2d 660, did not involve an appeal from a judgment of conviction.

[7] Petitioners have cited many more recent cases by the court holding that release of the prisoner pending appeal makes the appeal moot. See brief for petitioners *Lohrberg* and *Falbo*, companion cases, page 77.

There the government appealed from an order denying its motion to vacate an order placing defendant on probation after entry of the judgment and commitment. By time the appeal from the order was considered the defendant had served his time. The government's interest in the appeal had been terminated. The government was not harmed by a holding that the appeal was moot. Here, however, the petitioners will continue to suffer irreparable injury unless the merits of their cases are reviewed by this court.

It appears affirmatively that each petitioner is a citizen of West Virginia and within the jurisdiction of the District Court. The government in its motion did not show that the petitioners had departed from the jurisdiction of the court since serving sentence. It must be presumed that each petitioner continues to be subject to the jurisdiction of the court. As long as the petitioner is subject to the jurisdiction of the court below the case cannot be dismissed as moot because of having served his time. If the judgment is affirmed he will have served his sentence. If it is reversed and a new trial ordered, he will submit or be available for trial and subject to the jurisdiction of the court. If the judgment is reversed and the indictment ordered dismissed, he will be sustained in his rights, justice in criminal cases be subserved, and the government will not be injured, because all it is presumed to be concerned with is the accomplishment of justice in criminal cases.

If it be held that the cause is moot because of the release of the petitioners after the lapse of ten days, the time of the sentence, then since petitioners did not voluntarily enter upon the service of the sentences pending their appeals it is suggested that the causes be not held moot but that proceedings be stayed until petitioners be given opportunity to make bond to guarantee their remaining within the jurisdiction of the court, their appearance upon another trial or to perform whatever judgment is entered by this court. The

authority for this suggestion is *Smith* v. *United States*, 98 U. S. 97, in which the court refused to dismiss an appeal, as it also refused a motion of appellant's counsel to set the cause down for argument, where the appellant escaped from custody pending an appeal. The cause was left off the docket until the appellant submitted to the jurisdiction of the trial court. A similar order was made in *Bonahan* v. *Nebraska*, 125 U. S. 692. If escape from prison is not sufficient to make the appeal moot and to constitute an abandonment thereof, then, *a fortiori*, the serving of the sentence does not work such harsh results.

Points for Discussion

ONE

The opinion of this court in the *Falbo* case does not dispose of the many and broad questions presented here, therefore it was erroneous for the court below to overrule all assignments of error and affirm the judgments of the district court upon the reasons assigned by this court in the *Falbo* case and accordingly this court should exercise its sound discretion by granting the petitions for writs of certiorari.

TWO

In the field of rights guaranteed specifically by the United States Constitution to the sovereign people, the American doctrine of judicial supremacy for the protection of those rights precludes the judges from usurping the power entrusted to them or yielding it to the legislative and executive branches of the government on the demands of expediency and fleeting practical considerations of the hour, and because the courts below violated this concept this court should exercise its discretion and grant the petitions for writs of certiorari.

THREE

The Act and Regulations have been construed so as to constitute a Bill of Attainder contrary to Clause 3, Section 9 of Article I of the United States Constitution because they require an exempt registrant to report for induction as a condition precedent to judicial review and penalize the exempt registrant who fails to report by denying him the right to test the illegality of the administrative classification purporting to fix his duty under the Act and Regulations; therefore the court should exercise its discretion and grant the writs of certiorari because the court below erred in overruling the motions raising this issue.

FOUR

The Act and Regulations have been construed so as to deny the exempt registrant the right to a judicial trial, to urge his defense of no duty under the Act, to prove his innocence and to a jury trial on the elements of the offense, contrary to the Third Article, the due process clause of the Fifth Amendment and to the Sixth Amendment, United States Constitution; therefore the court should exercise its discretion and grant the writs of certiorari because the court below erred in overruling the motions raising this issue.

FIVE

The trial court committed reversible error in holding that each petitioner could not show, and that the jury could not consider, whether the draft boards had acted in excess of their authority, arbitrarily and capriciously and contrary to the evidence showing petitioner exempt, all of which was in such a manner as to violate the rights of petitioner and deny him his liberty without due process of law, contrary to the Fifth Amendment to the United States Constitution; therefore the court should exercise its discretion and grant the writs of certiorari.

SIX

The trial court committed reversible error in failing to grant the motion for a directed verdict at the close of all the evidence made in behalf of petitioners because the undisputed evidence showed that the Local Boards, the Boards of Appeal, and the State Director had violated the constitutional rights of said petitioners and acted contrary to the Act and Regulations and the due process clause of the Fifth Amendment to the United States Constitution by entirely disregarding and failing to consider petitioners' evidence, which established their exemption from duty under the Act and by classifying them as liable for duty under the Act and Regulations; therefore the court should exercise its discretion and grant the writs of certiorari.

SEVEN

The trial court committed reversible error in holding that Thomas Howard Stull could not show, and that the jury could not consider, whether the Nicholas County local board and its appeal board had violated the Act and Regulations and the due process clause of the Fifth Amendment by making prejudicial and malicious statements against petitioner Stull which disqualified them to act (causing a change of his classification from 4-D to 1-A, after the file had been transferred to the Greenbrier County local board) which statements prejudiced the Appeal Board and the State Director to such an extent as to disqualify them from acting and to the injury of petitioner; therefore the court should exercise its discretion and grant the writs of certiorari.

EIGHT

This court should hold that the trial court erred in excluding oral testimony and documentary evidence offered by petitioners to show that the local boards had classified and dealt with them in an unconstitutional and unlawful manner, in failing to give the requested charges submitting these defenses and in charging the jury that petitioners could not challenge the validity of the classifications and induction orders and stating that the action of the local boards was binding upon the court and jury; therefore the court should exercise its discretion and grant the writs of certiorari.

NINE

This court should exercise its sound discretion and grant the writs of certiorari in both of these cases because the trial court committed reversible error in refusing the requested instructions duly presented by petitioners in which the jury would have been permitted to consider the good faith and honest belief of each petitioner that he was exempt as a minister of religion in defense to the indictment in determining whether he unlawfully, wilfully, knowingly and feloniously refused to perform a duty imposed under the Act.

ARGUMENT

ONE

The opinion of this court in the *Falbo* case does not dispose of the many and broad questions presented here, therefore it was erroneous for the court below to overrule all assignments of error and affirm the judgments of the district court upon the reasons assigned by this court in the *Falbo* case and accordingly this court should exercise its sound discretion by granting the petitions for writs of certiorari.

The questions presented in these cases are not foreclosed by the decision of this Court in the case of *Falbo* v. *United States,* 320 U. S. 549, 64 S. Ct. 346. The precise issues raised in these cases were not decided by this Court in that case. The issues presented here are different. What is involved here is a constitutional question which was not urged in the main or reply brief filed by counsel for Falbo. The issue of bill of attainder was not

urged until after a search of the law on the motion for rehearing. "That search has brought to light a new and stronger constitutional objection not previously considered by either the court or counsel, being overlooked in the preoccupation with the other propositions involved" in the *Falbo* case.[8] The motion was overruled by the court and it can be assumed that the *new question* was not considered by the court because it was too late to present it on the motion for rehearing.

It is well settled that propositions of law urged for the first time upon a motion for rehearing may be rejected and not considered because raised too late.[9] Since the briefs of the parties did not directly urge upon the court to consider the precise constitutional objection raised here it must be assumed that the question was not within the view of the court when the construction of the statute was undertaken by the court. Therefore the rule that requires the court to construe the statute in such a manner as to avoid any doubts as to its constitutionality would not raise the presumption that the court considered this precise question. The fact that the express constitutional objections were not considered but side-stepped by the court is proved by the statements contained in the opinion of the court and the concurring opinion of Justice Rutledge. For the majority Mr. Justice Black said: "The narrow question therefore presented by this case is whether Congress has authorized judicial review of the propriety of a board's classification in a criminal prosecution for wilful violation of an order directing a registrant to report for the last step in the selective process." In Note 2 of the court's opinion it is stated that there was no attack upon the parts of the Act and Regula-

[8] The words quoted are from the Petition for rehearing in the *Falbo* case. It should be observed that the Petition was filed on Friday, January 28, 1944, and the order overruling the motion was announced on Monday, January 31, 1944. The same was probably disposed of by the court at its conference on Saturday, January 29, 1944.

[9] *Steines* v. *Franklin County*, 14 Wall. 15; *Godchaux* v. *Estopinal*, 251 U. S. 179; *Fullerton* v. *Texas*, 196 U. S. 192.

tions which require one to comply with the orders of the board. Here there is a direct attack upon both. Mr. Justice Rutledge states that his opinion was reached in the absence of a constitutional objection. Also it may be assumed that the court took all possible steps in avoiding a constitutional question when possible to decide the case on some other grounds. Furthermore, here are presented questions which go deeper than the mere *"propriety of a board's classification"* as was involved in the *Falbo* case. Here the court is called upon to consider whether or not the draft boards violated the rights and liberty of the petitioners contrary to the due process clause of the Fifth Amendment and the Act and Regulations thereunder governing the jurisdiction and procedure of the boards all of which were violated in these cases, which factors clearly distinguish the questions from those presented in the *Falbo* case.

"Lord Halsbury said in Quinn v. Leathem, 1901, A. C. 495, 506: 'A case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all.'"

It is submitted that these cases now before the court can be disposed of favorably to petitioners by distinguishing the *Falbo* decision and by limiting it to the precise question presented, that is to say, giving the *Falbo* decision a strict construction because it is in derogation of the constitutional rights of petitioners if applied here.

The qualification that was placed upon the rule announced in the *Falbo* case by the opinion of the court in *Billings, Petitioner,* v. *Truesdell, Major General,* No. 215 October Term 1943, that a selectee has exhausted his remedies when he reports for induction and refuses to take the oath has not weakened the position of the petitioners in these cases. Until the court spoke in the *Billings* case the

Falbo opinion had been interpreted to mean that a registrant had not exhausted his remedies until he had responded to the order and complied with its mandate by submitting to the jurisdiction of the military authorities. In the *Billings* case the court said, "It should be remembered that he who reports at the induction station is following the procedure outlined in the *Falbo* case for the exhaustion of his administrative remedies. Unless he follows that procedure he may not challenge the legality of his classification in the courts. But we can hardly say that he must report to the military in order to exhaust his administrative remedies and then say that if he does so report he may be forcibly inducted against his will. That would indeed make a trap of the *Falbo* case by subjecting those who reported for completion of the Selective Service process to more severe penalties than those who stayed away in defiance of the board's order to report."

If one is not reporting for the purpose of submission to induction into the armed forces, why should he report? The purpose of reporting at the induction station is to be received into the armed forces and not to complete the administrative process. One is not to have his rights to judicial review of the last and final order depend on an act or step which does not contemplate some hearing or which does not give the registrant an opportunity to reverse the finding of the administrative agency. The compliance with the final administrative order by reporting for induction does not contemplate such results whatever. Therefore to require an exempt registrant to submit to the order by partial compliance before qualifying him for a judicial review of an illegal order is to require him to do a vain thing. It is a fundamental rule that the law does not require the doing of a vain thing.

The compliance with the order or process is not an administrative remedy and forms no part of what are called administrative remedies. In the opinion of this court

handed down in *Yakus* v. *The United States*, No. 374, October Term 1943, on March 27, 1944, the court recognized the distinction between exhaustion of the administrative remedies and the compliance with a final order. In that case the defendant still had open an opportunity for full judicial review by appealing to the Emergency Court. In that opinion it is intimated that if the opportunity for further review of the administrative order involved was not allowed the results may have been different. In the cases at bar the final order which was not complied with by petitioners cannot be further reviewed in the administrative agency. All efforts to obtain review of the classification within the administrative agency by appeal to the State Director and National Director in each case had been exhausted. There was no opportunity for judicial review by appeal from the order of the administrative agency. Neither petitioner had an opportunity to assert his exemption, or the invalidity of the order or the unconstitutionality of the Statutes and Regulations as construed until charged by indictment for failure to report for induction. Neither petitioner could have asserted any of these claims at the induction station. If he could not urge the claims under the Act at the time and place required to report, by force of reason it must be concluded to be ridiculous to require him to submit to the order as a condition to attacking it. In the *Yakus* case the defendant named in the indictment had an opportunity to urge the questions attempted to be raised in defense to the indictment before the Emergency Court but he failed to avail himself of this remedy. There is no such remedy in the cases at bar.

The further steps to be taken at the induction station do not contemplate a hearing or an opportunity to have the registrant's claim for *exemption* from training and service passed upon. Before the rule requiring exhaustion of administrative process can be applied, the remaining steps must be remedies that enable the registrant to obtain pro-

tection of his claim for exemption from duty under the Act. If available steps merely serve to execute and satisfy the administrative process and will not safeguard the aggrieved, then such are not administrative remedies of the kind which must be exhausted as a condition precedent to judicial review. Admittedly, therefore, the administrative step of reporting for induction offers no chance of relief, and hence does not accord with requirements of procedural due process. Resort to such a "remedy" would be hollow formalism, futile; and need not be exhausted as a condition of judicial review. *Utley* v. *St. Petersburg,* 292 U. S. 106. Since the "remedy" does not contemplate a hearing on the claim for exemption from duty it cannot be regarded as one that needs to be exhausted as a prerequisite to judicial review. *Kansas City Sou. R. Co.* v. *Ogden Levee Dist.* (CCA 8th), 15 F. 2d 637.

The court has uniformly held that a litigant seeking judicial review of an administrative determination is not required to resort to some extraordinary method or process as a condition precedent to enjoyment of the existing methods of judicial review. Any remedy that does not contemplate a change of the administrative determination within the administrative agency need not be exhausted or complied with before applying to federal courts for relief. *Lane v. Wilson,* 307 U. S. 268; *Railr'd & W. Comm'n of Minn.* v. *Duluth St. R. Co.,* 273 U. S. 625; *Gully* v. *Interstate Natural Gas Co., Inc.* (CCA 8th) 82 F. 2d 145. The maxim of administrative law requires the exhaustion of administrative remedies provided by the act. It has never been held that the compliance with an order was an administrative remedy and especially when, as here, the order does not contemplate a hearing or any remedy to change the classification made by the agency. Since there is no remedy available by compliance with the order each petitioner was under no obligation to comply with the order.

Furthermore, petitioner was not obliged to exhaust the

so-called remedy declared by the court to exist through reporting for induction, because under law petitioner was a *minister of religion* exempt from all training and service and therefore not subject to induction and not under duty imposed by the Act. The court has held that where one is not subject to an act creating administrative remedies he is not required to exhaust the administrative remedy. In *Gonzales* v. *Williams,* 192 U. S. 1, the Act provided that an alien erroneously denied entry into the United States by the ruling of the Commissioner of Immigration could appeal to the Superintendent of Immigration and thence to the Secretary of the Treasury for relief. It was held that one claiming to be a citizen and not subject to the Act did not have to exhaust these administrative remedies, the court saying: "And in the present case, as Gonzales did not come within the Act of 1891, the Commissioner had no jurisdiction to detain and deport her by deciding the mere question of law to the contrary; and *she was not obliged to resort to the Superintendent or the Secretary.*" (Italics added) In *Skinner & Eddy Corp.* v. *United States,* 249 U. S. 557, it was contended that an agency had exceeded its statutory authority and that the order was void for that reason. It was held that the courts had jurisdiction of a suit to enjoin enforcement of such an order, even though plaintiff had not attempted to secure redress in a proceeding before the agency.

The criterion for ascertaining when an administrative remedy has been exhausted is whether the highest administrative or other body of legislative character empowered to act on the classification of the registrant has done so. The appeal board had denied petitioner's claim for exemption. The State and National Directors had refused to exercise their discretion. The unconditional order to report for induction was the last order. It was the execution process issued by the board to enforce the determination of the highest authority within the administrative scheme. Nothing remained for petitioner to do to obtain the exemption

allowed him by the law. It was the last order and terminated the proceedings of the system. The military or camp authorities have charge of the induction station, and not the Selective Service System. There the Armed Forces or the Camp Operators take over the registrant. If he disobeys the order he is taken into custody by the Department of Justice.

The construction placed upon the Act and Regulations in the *Falbo* case, as qualified and explained by the court in the *Billings* case, so as to require the registrant to undergo an idle ceremony of reporting for induction and refusing to take the oath so as to exhaust the administrative process and so as to avoid subjecting himself to military jurisdiction is a maxim of law which adds to the strength of the argument that the Act and Regulations as thus construed have been converted into a bill of pains and penalties in violation of the bill of attainder clause of the Constitution.

It is harsh enough to deny defenses to an indictment where the defendant has not exhausted every channel to obtain judicial review of the administrative action which is open to him, as in the *Yakus* case, but it comes very near approaching the ancient trial by ordeal to require a registrant to report for induction when there is no opportunity whatever to obtain a change of the classification or a reversal of the action or determination of the administrative agency, and where his only means of avoiding being thrown into the hands of the military authorities is the refusal to take an oath. A person, be he ever so humble and despised, should not be required to run to the end of the rope when the end thereof does not permit him to reach any relief whatever.

To whatever extent it is argued that the *Falbo* case has disposed of any of the questions here presented it is urged that the court grant the writs of certiorari for the purpose of reconsidering the doctrine announced in the *Falbo* case.

TWO

In the field of rights guaranteed specifically by the United States Constitution to the sovereign people, the American doctrine of judicial supremacy for the protection of those rights precludes the judges from usurping the power entrusted to them or yielding it to the legislative and executive branches of the government on the demands of expediency and fleeting practical considerations of the hour, and because the courts below violated this concept this court should exercise its discretion and grant the petitions for writs of certiorari.

The distinguishing characteristic of the American system of government is the extraordinary power and position of the judiciary. The people established in the Constitution written limitations upon the legislature and the executive. These limitations of the Constitution are superior to any legislative act. It is the duty, function and power of the judiciary to say what the law is, and if legislative or executive acts are found to be in conflict with the fundamental law, to declare such acts invalid. In this way the legislative and executive department are held within the bounds of authority as understood and interpreted by the judicial power.[10] In these United States principles of law and political practice have been evolved and established which place the guardianship of the expressed and implied terms of written constitutions primarily in courts of justice, and the dominance of opinions in expressing the law in accordance with common law principles and standards constitutes the basis of what may appropriately be termed the American doctrine of judicial supremacy.[11]

[10] Haines, *The American Doctrine of Judicial Supremacy*, University of California Press, 1932, p. 23.

[11] Haines, *op. cit.*, p. 27.

This doctrine of judicial supremacy in America established by the people of the United States through the Constitution places the federal courts in a high and peculiarly responsible position that abrogates the erroneous conclusions reached by the court below in these cases.

To avoid oppression of the people by usurpation of power, the federal courts, as expositors and protectors of the fundamental law, carry the grave duty of maintaining the delicate balance of the three branches of government. In discharging this supreme and direct responsibility to the people the courts cannot surrender their judicial power nor transfer their responsibility to make judicial determinations to an executive or legislative agency. This non-transferable jurisdiction must be maintained and exercised to preserve the treasures of the people locked securely by the founding fathers in the Constitution.

"The utility of an external power restraining the legislative judgment is not to be measured by counting the occasions of its exercise. The great ideals of liberty and equality are preserved against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles, by enshrining them in constitutions, and consecrating to the task of their protection a body of defenders. By conscious or subconscious influence, the presence of this restraining power, aloof in the background, but none the less always in reserve, tends to stabilize and rationalize the legislative judgment, to infuse it with the glow of principle, to hold the standard aloft and visible for those who must run the race and keep the faith.

"Great maxims, if they may be violated with impunity, are honored often with lip-service, which passes easily into irreverence. The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making

vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges. This function should preserve to the courts the power that now belongs to them."[12]

Supremacy and independence of the American judiciary was the subject of a studied examination made by Chief Justice Taney in his opinion reported in full in the appendix to *Gordon* v. *United States*, 117 U. S. 697. That opinion is said to have been his last judicial utterance, placed in the hands of the clerk shortly before his death. There the act of Congress provided that the judgments of the Court of Claims entered against the United States should not be paid until an appropriation had been estimated by the Secretary of the Treasury and approved by Congress. The Act was held unconstitutional because it made the process of the Court of Claims, and ultimately this court in cases appealed to it, dependent on the future actions of the Secretary of the Treasury and Congress. After a full and learned discussion of the functions of the departments of government in which the independence of the judiciary as established by the Constitution was emphasized, the Chief Justice declared, at page 706:

"These cardinal principles of free government had not only been long established in England, but also in the United States from the time of their earliest colonization, and guided the American people in framing and adopting the present Constitution. And it is the duty of this court to

[12] Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven 1921), pp. 92-94. See also Jefferson's *Works*, Vol. 3, p. 223, where it is said: "All the powers of government—legislative, executive, and judiciary —result in the legislative body. The concentrating these in the same hands is precisely the definition of despotic government. It will be no alleviation that these powers will be exercised by a plurality of hands, and not by a single one. One hundred and seventy-three despots would surely be as oppressive as one. . . . An elective despotism was not the government we fought for, but one which should not only be founded on free principles, but in which the powers of government be so divided and balanced among several bodies of magistracy, as that no one could transcend their legal limits, without being effectually checked and restrained by the others."

maintain it unimpaired as far as it may have the power. And while it executes firmly all the judicial power entrusted to it, the court will carefully abstain from exercising any power that is not strictly judicial in its character, and which is not clearly confided to it by the Constitution."

The basic pronouncements of the strict limitation imposed upon the judiciary by the Constitution, as declared by Chief Justice Marshall in *Marbury* v. *Madison*, 1 Cranch 137, cannot be overlooked; and it would be well for the courts to consider again those profound principles of justice. In that case and subsequent decisions Chief Justice Marshall with telling blows spiked down the foundation planks of the constitutional system. He set up judicial review, previously envisioned by the writers of the Constitution, as a working principle and as the mooring cables by which the three departments of government have been held to the Constitution.

There have always been opponents of the doctrine of judicial supremacy, even among members of the judiciary. In recent years there has been a growing opposition among scholars, law professors, lawyers and judges, to continued exercise of the doctrine. Even some writers have gone so far as to argue that the power of judicial review was never envisioned or intended by the founding fathers.[13] But, be that as it may, it is certain that the framers of the Constitution, as well as those who had part in arguing for its adoption, certainly anticipated that the judiciary should not only have the power to declare laws of Congress unconstitutional, but also to fearlessly and unhesitatingly exercise that power when the occasion demanded it.

When the unwritten British constitution and the Colonial courts proved to offer no sanctuary the founding fathers placed sole reliance upon the "laws of nature and of nature's God" and expressed their convictions that these were "self evident" truths, because they were derived from a source of universal authority. Thus, in the Declaration of Inde-

[13] Jackson, *The Struggle for Judicial Supremacy*, 1941, Knopf, passim.

pendence is expressed the philosophy of government, its limitations and its ends; and the judiciary was contemplated as a refuge from tyranny.

In the Virginia Plan submitted to the Constitutional Convention on May 29 it was expressly provided for judicial authority to declare laws invalid in the eighth article of the plan.[14] Although the Virginia plan was rejected it was in connection with its discussion that most of the utterances concerning judicial review were made. It appears that all in attendance who expressed themselves on the subject were unanimously of the opinion that the judiciary should have the final say on the invalidity of laws and that this power was necessary to maintain the balance of governmental powers and protection of the people. Elbridge Gerry, on June 4, said that the judiciary "will have a sufficient check against encroachments on their own department by their exposition of the laws, which involved a power of deciding on their constitutionality".[15] Madison said that the judiciary would have "an additional opportunity of defending itself against legislative encroachments".[16] The same views were expressed by every man who said anything on the subject at the convention.[17]

When the Constitution as proposed was being debated in the struggle for ratification the spokesmen for its adoption were almost unanimous in the belief that the judiciary would be the means of restraint upon the government to protect the people. "If the United States go beyond their powers," said Oliver Ellsworth in Connecticut, "if they make a law which the Constitution does not authorize, it is void; and the judicial power, the national judges, who to secure their impartiality, are to be made independent, will declare it to be void."[18] John Marshall, in the Virginia con-

[14] Farrand, *Records of the Federal Convention*, Vol. I, p. 21.
[15] *Ibid.*, 97-98.
[16] *Op. cit.*, Vol. II, p. 74.
[17] *Op. cit.*, Vol. I, p. 109; *Ibid.*, Vol. II, pp. 73, 76, 78 and 300 for statements by King, Martin, Sherman, Gorham, Wilson, Mason and others.
[18] Farrand, *op. cit.*, Vol. III, pp. 240-241.

vention, employed almost the same words,[19] as did Grayson,[20] Randolph,[21] Pendleton,[22] Wilson,[23] Davie.[24] Patrick Henry, an opponent of the Constitution, had the highest praise for judicial review of legislation and recognized its necessity for the preservation of liberty. He said: "I take it as the highest encomium on this country, that the acts of the legislature, if unconstitutional, are liable to be opposed by the judiciary."[25] Hamilton in Number 78 of *The Federalist* was not content with a brief statement that the courts would declare acts contrary to the Constitution void. He goes further and sets forth the principle of fundamental law in such fashion as to make of it the voice of the people with the judges the true guardians of their liberty. He declared that only the judges can give a final interpretation as to the meaning of the Constitution and that anything else would be to subvert "the intention of the people to the intention of their agents".[26]

When the first Congress met, Mr. Madison introduced the proposals which later became the first ten Amendments to the Constitution. On this occasion he said that the courts would "consider themselves in a peculiar manner the guardians of those rights; they would be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights".[27] In 1802 a heated controversy arose in Congress over the effort to repeal the Judiciary Act of 1801. In the course of the debate over this proposal to repeal the Act the principle of judicial review

[19] Elliott, *Debates* (2d ed.), Vol. III, 553.
[20] *Ibid.*, 567.
[21] *Ibid.*, 205.
[22] *Ibid.*, 548.
[23] McMaster and Stone, *Pennsylvania and the Federal Constitution* (1888), 304, 340, 354.
[24] Elliott, *Debates*, Vol. III, 155-157.
[25] *Ibid.*, Vol. III, 325, 539-541.
[26] *The Federalist* (Ford ed.), p. 521.
[27] 1 *Annals of Congress*, 439.

was discussed repeatedly and at length. "All the reasons for the opinion which John Marshall, exactly one year later, pronounced in *Marbury* v. *Madison,* were given during this debate."[28]

Around and by the six-thousand-word document, as a skeleton, the federal judiciary has built up, under the guidance of the Supreme Court, an expansive body of law governing the conduct of the individual, the state and the nation, in many fields. Thus the judiciary has balanced the American way of life to hold together the union and enabled it to reach maturity through the expanse of the people, their industry and commerce and other institutions. At all times the courts have attempted to use the Constitution as the blueprint of the governmental way of life.

That great document was intended to guarantee the blessings of liberty, life and happiness, not only to the generation living at the time of its adoption, but also to those of posterity that were to follow them. To promote the general welfare of the people it has been necessary for the courts to construe the document as a flexible instrument so as to accommodate the needs of the government and the people under the vicissitudes of life and growth.

Those who have studied closely the opinions of the federal judiciary have witnessed the rigid rules of *laissez faire* against governmental interference and regulation of business, commerce and labor which had its origin in the days of the *horse and buggy* give way and yield to the demands of changing conditions; and have seen the courts then turn around, under the same constitutional provisions, and sustain such regulations and legislative measures. In the field of labor and social measures there has been a similar change from one extreme to another. The changed view of the judiciary in such matters has depended largely on a new and different appraisal of the social and economic conditions surrounding the people of the nation. These conditions have

[28] Beveridge, *Life of John Marshall,* Vol. III, Ch. 2.

changed from generation to generation. From the rugged individualism, independence of the contractual rights and business there have been changes to mass production, mass integration of the people into groups and classes, gigantic corporations in all fields of business, chain industry and vast transportation networks, huge business concerns carrying their goods, wares and merchandise by interstate commerce from various key points in the nation to every village and hamlet of the nation and to the great centers of population in the large cities.

It cannot be said that the changed views of the judiciary on the manifold and diverse economic, social, labor, industrial and commercial questions that have come before the judiciary in recent years is due to caprice, nor can it be said to be a reckless discarding of old principles for new heresies. It has been said to be a continuous, rational process by which old principles are applied to new and changing conditions, and which process is absolutely necessary, if government is to be kept adequately equipped to deal with the problem of modern life under the flexible general welfare, commerce, and due process clauses of the Constitution. This flexibility does not mean weakness. A constitution cannot long endure which is not adaptable to the needs of the growing nation so as "to form a more perfect union, establish justice, . . . promote the general welfare".[29]

In the fields of economic welfare of the nation, social welfare and commerce it may well be said that the people, by the Constitution, fixed a rather broad *river bed* through which the judiciary could fix a channel for the flow of the governmental regulatory waters to reach the aims of the government through proper legislation. This broad bed has allowed for many changes in the course at various points along the stream of time and constitutional history of the

[29] This matter is elaborately and scholarly treated by Wright in *The Growth of American Constitutional Law*, Reynal & Hitchcock, 1942; by Jackson in *The Struggle for Judicial Supremacy*, Knopf, 1941; and by Haines in *The American Doctrine of Judicial Supremacy*, 1932.

nation in the above-mentioned fields of life.

But in the field of civil rights, procedural rights in criminal cases, and those of fundamental personal liberties, all of which are secured to the people in the Constitution by express guarantees, there is not established a broad channel for the government and the courts to operate. On the contrary, the people by the specific guarantees of the Constitution have definitely narrowed the channel of activity and *walled* it in by high banks of rock on both sides to prevent a change of course; and, if the government should, through some violence or other means, get out of its fixed course in these precious fields there immediately arises a presumption of invalidity and unconstitutionality to throw back the stream of regulation into the fixed channel properly established by the people through the specific guarantees written in the Constitution. Therefore the changed conditions that have authorized the shifting of the judicial, legislative and executive course in the fields of labor, social welfare, business and commerce are not sufficient authority to justify a change in these *sacred* fields without express authorization from the people by an amendment of the Constitution in the manner prescribed therefor in the document.

"The very purpose of a Bill of Rights[30] was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the

[30] This also applies to the other specific prohibitions of the Constitution, such as Cl. 3, Sec. 9 of Art. I, prohibiting bills of attainder, and the specific guarantees of rights in criminal cases found in the Constitution and the Fifth and Sixth Amendments.

principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First become its standard.[31] The right of a state to regulate, for example, a public utility, may well include, so far as the due-process test is concerned, power to impose all of the restrictions that a legislature may have a 'rational basis' for adopting. But freedom of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment that bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case. . . .

" . . . These principles grew in soil which also produced a philosophy that the individual was the center of society, that his liberty was attainable through mere absence of governmental restraints, and that government should be entrusted with few controls and only the mildest supervision over men's affairs. We must transplant these rights to a soil in which the *laissez-faire* concept or principle of non-interference has withered at least as to economic affairs, and social advancements are increasingly sought through closer integration of society and through expanded and strengthened governmental controls. These changed conditions often deprive precedents of reliability and cast us more than we would choose upon our own judgment."—Mr. Justice Jackson in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638-640. See also *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152; *Busey* v. *District*

[31] It seems that this principle would also apply to the due process clause of the Fifth Amendment.

of Columbia, — U. S. App. D. C. —, 138 F. 2d 592.[32]

This limitation and restraint is not only against the legislative and executive branches of the national and state governments, but it also applies to the judiciary, which has the additional burden of keeping a vigilant watch that under these guarantees the people are protected from regulation and prohibition enacted against said specific provisions of the Constitution.

It is not the prerogative of the United States courts to surrender any of their power or to refrain from exercising judicial review of legislation in wartime. On the contrary, it is during times of hysteria and war emotions that the courts should be more vigilant in the scrutiny of legislative acts and administrative measures that are claimed to abridge the liberty of the citizen. In *Ex parte Milligan,* 2 Wall. 2, 120, Mr. Justice Miller said: "Those great and good men foresaw that troublous times would arise, when rulers and people would become restive under restraint, and seek by sharp and decisive measures to accomplish ends deemed just and proper; and that the principles of constitutional liberty would be in peril unless established by irrepealable law. The history of the world had taught them that what was done in the past might be attempted in the future. The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. No doctrine, involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government."

Daniel Webster declared: "No conviction is deeper in my mind than that the maintenance of the judicial power is

[32] Mr. Madison said: "Is it not the glory of the people of America, that whilst they have paid a decent respect to the opinions of former times and other nations, they have not suffered a blind veneration for antiquity, for custom, or for names, to overrule the suggestions of their own good sense, the knowledge of their own situation, and the lessons of their own experience?"—*The Federalist,* No. 4.

essential and indispensable to the very being of this government. The Constitution without it would be no constitution; the government, no government. I am deeply sensible, too, and, as I think, every man must be whose eyes have been open to what has passed around him for the last twenty years, that the judicial power is the protecting power of the whole government."[33]

Mr. Taft, when President, on vetoing the "recall" section of the Arizona Constitution, said: "In order to maintain the rights of the minority and the individual and to preserve our constitutional balance, we must have judges with courage to decide against the majority when justice and law require."[34] When Chief Justice he decreed: " . . . this is a government of laws and not of men."[35]

This court is confronted with new questions which "often deprive precedents of reliability and cast" it more upon its own judgment. The situation may be well compared to that which confronted the United States District Court in the case of *Barnette* v. *West Virginia State Board of Education.* Although the *Falbo* decision has not been impaired for the precise point that it disposed of as had been the *Gobitis* case, nevertheless the *Falbo* decision is such a narrow-guage decision that it cannot guide the court here or act as precedent for the disposition of this case. In these cases the petitioners have hauled out and are using much heavier artillery than was used by Falbo against the United States of America before the Supreme Court. That is to say, the specific provisions of Clause 3 in Section 9 of Article I of the Constitution must be overcome by the Government, not to mention the other constitutional provisions relied upon.

Even though it be considered that the *Falbo* decision is directly challenged here it must "be regarded hereafter as the law of this court, that its opinion upon the construc-

[33] *Webster's Works*, Vol. 3, p. 176.
[34] Special Message to Congress, August 19, 1911.
[35] *Truax* v. *Corrigan*, 257 U. S. 312, 332.

tion of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." (*The Passenger Cases,* 7 How. 283, 470) Justice Stone has said that the doctrine of *stare decisis* "has only a limited application in the field of constitutional law." (*St. Joseph Stock Yards Co.* v. *United States,* 298 U. S. 38, 94) Mr. Justice Brandeis has declared that "in cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning, recognizing that the process of trial and error, so fruitful in the physical sciences, is appropriate also in the judicial function." (*Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406) "Precedents largely govern the conclusions and surround the reasoning of lawyers and judges. In the field of common law they are a force for stability and predictability, but in constitutional law they are the most powerful influence in forming and supporting reactionary opinions. The judge who can take refuge in a precedent does not need to justify his decision to the reason. He may 'reluctantly feel himself bound' by a doctrine, supported by a respected historical name, that he would not be able to justify to contemporary opinion or under modern conditions." (Jackson, *The Struggle for Judicial Supremacy,* p. 295)

" 'The rules and principles of case law have never been treated as final truths, but as working hypotheses, continually retested in those great laboratories of the law, the courts of justice. Every new case is an experiment; and if the accepted rule which seems applicable yields a result which is felt to be unjust, the rule is reconsidered. . . . The principles themselves are continually retested; for if the rules derived from a principle do not work well, the principle itself must ultimately be re-examined.' " (Cardozo,

The Nature of the Judicial Process, p. 23) "Not all the progeny of principles begotten of a judgment survive, however, to maturity. Those that cannot prove their worth and strength by the test of experience, are sacrificed mercilessly and thrown into the void." (Cardozo, *ibid.* p. 22)[36] "Some judges seldom get beyond that process in any case. Their notion of their duty is to match the colors of the case at hand against the colors of many sample cases spread out upon their desk. The sample nearest in shade supplies the applicable rule. But, of course, no system of living law can be evolved by such a process, and no judge of a high court, worthy of his office, views the function of his place so narrowly. If that were all there was to our calling, there would be little of intellectual interest about it. The man who had the best card index of the cases would also be the wisest judge. It is when the colors do not match, when the references in the index fail, when there is no decisive precedent, that the serious business of the judge begins." (Cardozo, *ibid.* pp. 20-21)

The courts are not left to themselves to set in motion the forces to reconsider unjust opinions. It is the duty of counsel "who strive at your bar" who "venture to think ourselves also in some measure consecrated to the task of administering justice. Recent opinions have reminded us that the initiative in reconsidering legal doctrine should come from an adequate challenge by counsel. Lawyers are close to the concrete consequences upon daily life of the pronouncements of this Court. It is for us to bring the cases and to present for your corrective action any wrongs and injustices that result from operation of the law."[37] Were the courts left to their own devices for the engendering motion to set aside erroneous opinions the process may be unduly

[36] "With effervescing opinions, as with champagne, the quickest way to let them fall flat is to let them get exposed to the air."—Justice Holmes in *Abrams* v. *United States*, 250 U. S. 616.

[37] Address of Robert H. Jackson, Attorney General of the United States to the Chief Justice and Associate Justices at the ceremonies in commemoration of the 150th Anniversary of the Supreme Court, February 1, 1940.

delayed and with very costly results to the people.[38] "It has been my duty and good fortune . . . to present to the Supreme Court . . . cases which called for a reconsideration of what we regarded as offending precedents. . . . I consider it no part of my duty to worship the Supreme Court or its Justices. One of them has written of another: 'Like all human institutions, the Supreme Court, he believed, must earn reverence through the test of truth.' " (Jackson, *The Struggle for Judicial Supremacy,* xvii-xviii.)[39]

[38] Compare *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64, overruling an erroneous and unjust rule of ninety-six years' practice started in *Swift* v. *Tyson,* 16 Pet. 1, under which millions of dollars had been paid.

[39] "It is a mistake to suppose that the Supreme Court is either honored or helped by being spoken of as beyond criticism. On the contrary, the life and character of the justices should be the object of constant watchfulness by all, and its judgments subject to the freest criticism. The time is past in the history of the world when any living man or body of men can be set on a pedestal and decorated with a halo. True, many criticisms may be, like their authors, devoid of good taste, but better all sorts of criticisms than no criticism at all. The moving waters are full of life and health; only in the still waters is stagnation and death."—Justice David Josiah Brewer, in an address on Lincoln Day in 1898 (See *Government by Injunction,* 1898, 15 Nat. Corp. Rep. 849).

THREE

The Act and Regulations have been construed so as to constitute a Bill of Attainder contrary to Clause 3, Section 9 of Article I of the United States Constitution because they require an exempt registrant to report for induction as a condition precedent to judicial review and penalize the exempt registrant who fails to report by denying him the right to test the illegality of the administrative classification purporting to fix his duty under the Act and Regulations; therefore the court should exercise its discretion and grant the writs of certiorari because the court below erred in overruling the motions raising this issue.

The judiciary has given a construction to the Act and Regulations which has converted the same into a Bill of Attainder and thus the Act and Regulations are drawn into collision with the provisions of Clause 3, Section 9 of Article I of the United States Constitution prohibiting the enactment of a bill of attainder. Clause 3 reads: "No bill of attainder or ex post facto law shall be passed."

We now proceed respectfully to discuss the constitutional effect of the ruling of this court in the case styled *Falbo* v. *United States* (320 U. S. 549) for the purpose of showing how this high tribunal in the construction placed on the Act and Regulations resurrected in this time of governmental crisis the hideous instruments of tyranny that were in vogue to inflict injury and oppression upon the people more than three centuries ago and which if not corrected will subvert the system of law and the *American*

Doctrine of Judicial Supremacy for which the fathers fought, lived and died to bring into being and for which the nation is now avowedly fighting to preserve. Therefore the question is deserving of the most exacting judicial scrutiny. These serious constitutional objections cannot be brushed aside on the fictitious theory that this high Court cannot render unconstitutional opinions. The court itself has proved that it has recently rendered two unconstitutional opinions against Jehovah's witnesses.[40]

The status of supremacy of this Court under the law in the discharge of its function is well stated by Charles Evans Hughes, thus: "We are under a Constitution, but the Constitution is what the judges say it is." *Addresses and Papers of Charles Evans Hughes* (Putnam, 1916), pp. 185-186.

"The Constitution nowhere provides that it shall be what the judges say it is. . . . What the Constitution does say is: 'The judicial Power shall extend to all cases . . . arising under this Constitution . . .' and that 'This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the land.'" (*The Struggle for Judicial Supremacy,* Jackson, pp. 3-4) "Since Lord Chief Justice Coke bluntly told King James that while the King was under no man, he was under God and the law"[41] it must be assumed that "in cases involving the Federal Constitution, where correction through legislative action is practically impossible",[42] erroneous precepts of this Court should be openly challenged by counsel with the boldness of Lord Coke, in the public interest, so that the goal "equal justice under law" may be attained and maintained by this Court.

The question of whether the Act and Regulations have

[40] *Minersville School District* v. *Gobitis,* 310 U. S. 586; *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624; *Jones* v. *Opelika,* 316 U. S. 584; *Jones* v. *Opelika,* 319 U. S. 103; *Murdock* v. *Pennsylvania,* 319 U. S. 105.

[41] Robert H. Jackson, Associate Justice of the Supreme Court of the United States, speaking before The Judicial Section of the New York State Bar Association at New York City, Saturday afternoon January 22, 1944.

[42] *Burnet* v. *Coronado Oil & Gas Co.,* 285 U. S. 393, 406.

been construed so as to constitute a bill of attainder is easily decided once it is understood just what constitutes a bill of attainder of pains and penalties. The Constitution plainly says that Congress cannot do what this court, in the *Falbo* case, said Congress did do. The explicit provisions of the bill of attainder clause cannot be sidestepped by such slender and practical considerations as would permit the court to sustain the Act and Regulations under the vague and general provisions of the due process clause. Once it is shown to have the appearances of and to wear the garments of the condemned pains and penalties bills prohibited by Clause 3 of Section 9 of Article I of the United States Constitution it must be presumed that the Act and Regulations are unconstitutional.

As is hereinafter shown in greater detail, bills of pains and penalties and of attainder were of three kinds. One is where a person is commanded to surrender for the performance of a certain act or duty at a time and place; upon failure to thus appear he was tried upon the conclusive presumption of duty and a violation thereof while the only issues submitted to the jury were whether he actually reported at the time and place and whether he was the person named in the bill. The second kind of the condemned bill was where a person was denied a right for failure to undergo a ceremony or take a test oath. The third and general kind was declared to be any law that deprived a person of a judicial trial. The Act and Regulations as construed take on the qualities of all three kinds of the ancient condemned bills of attainder and of pains and penalties.

The learned scholar Richard Wooddeson, a contemporary of that dark period in English history, in one of his series of lectures at Oxford University delivered during the term commencing in 1777, gives us a description of the tyrannical system of attainders. Those lectures are collected in the volume entitled *A Systematical View of the Laws of England*. In Lecture XLI (pp. 621-648) we read, *inter alia:*

"All of the modes of criminal prosecutions hitherto spoken of, whether by impeachment or otherwise, are vindications of the laws in being, on which they are wholly founded. But besides the regular enforcement of established laws, the annals of most countries record signal exertions of penal justice, adapted to exigencies unprovided for in the criminal code. Such acts of the supreme power are with us called *bills of attainder* which are capital sentences, and bills of pains and penalties, which inflict a milder degree of punishment."

Wooddeson proceeds to explain about the different kinds of bills of attainder and their effect. The one most like the bill of attainder found in the criminal sanctions clause of Section 11 of the Selective Training and Service Act of 1940 provided for a trial before the court of the King's Bench in which the questions of trial before the jury were limited to whether or not the defendant was the person named in the bill, and whether or not he failed to report at the time and place mentioned in the bill.

The similarity between the proceedings in such trials and those under the Act here challenged is striking and shocking. At pages 625 to 630 Wooddeson says:

"First as to the crime. It has been usual in times of domestic rebellion to pass acts of parliament, inflicting the penalties of attainder on those by name, who had levied war against the king, and had fled from justice, provided they should not surrender by a day prefixed. Such bills have been compared to process of outlawry at common law. But they are not to be eluded, like attainders on that process, to which many pleas and exceptions may be taken. The scope of such laws we are now considering seems to respect the crime. No alteration is made in the legal rules of evidence. Supposing the prisoner's identity of person, or his surrendering by the time limited be contested, these questions are to be decided by the same testimony as would be admissible on other trials. Neither is any varied modification of punish-

ment. But a material innovation is made respecting the crime. For neglecting to surrender by the appointed day constitutes, or rather indeed consummates the new treason, against which the attainder is directed.

"The acts of attainder, passed against domestic rebels, are enforced in a summary mode. No indictment is preferred to a grand jury; but the statute is certified into the chancery by the clerk of the parliament, in pursuance of a writ to him directed for that purpose. It is afterward removed into the King's Bench; and there the whole being entered on record, the prisoner is asked what he has to allege, why execution should not be awarded against him. If a question of fact arises, as to identity of person, or a due surrender in time, a jury is summoned to meet instanter; and, as both these may be termed collateral issues (that is, not the general one, which in criminal cases is 'guilty' or 'not guilty') the prisoner on the one hand seems not to be entitled to peremptory challenges, but on the other, to have a right to the full assistance of counsel."

The striking parallelism of those English bills of attainder with conclusions reached by the trial court in these cases is compelling. It should be noticed that the English bills of attainder for treason were identical with the conclusion reached by said court in this case. Such English 'bills of tyranny' provided that an individual or class of individuals were guilty of the crime of treason unless they reported at a certain time and place and surrendered themselves to the mercy of the king's henchmen. If such person or persons failed to report at the time and place indicated they were "tried" and "convicted" of the crime of treason. Upon the trial the issue was confined to whether or not the accused was the person named in the bill and whether or not he failed to report at the time and place named.

In cases prosecuted under the Selective Training and Service Act of 1940, the legislative creature (i.e., each local board acting as the arm of the executive branch) reports to

the Department of Justice that the exempt person was found "guilty" by the board of owing a duty for training and service under the Act and was ordered to surrender himself at a time and place fixed by the administrative agency. For this the defendant is conclusively presumed, as in the English attainder cases, to be guilty of violating the statute. Upon his so-called "trial" the issue is limited to whether or not the accused is the person named in the indictment and whether he failed to report as ordered by the 'creature of the legislature'.

Manifestly that is a modern-day, streamlined, twentieth-century *bill of attainder!* In no other way can it be better described. In the English attainder cases there was no inquiry as to whether the defendant had committed treasonable acts; and in the cases under the Act in question there is no inquiry as to whether the defendant owed a duty.

The right to prove innocence was then and is now a very substantial right.

The evil aimed at by the founders of this nation when embodying the article in the Constitution was the arbitrary and summary denial of every person's freedom to exercise the right to prove innocence in a court of justice, as such denial was practiced under the English bill of attainder.

The founders also desired to escape the insurmountable obstacle of a conclusive presumption of "guilt" that followed the bill of attainder into the court even as now a like presumption follows the order to report for induction into a district court in these United States.

Here and now, under the Act in question, the judge is given the right to fix the punishment but that does not prevent the Act's becoming the bill of attainder. The vice in the proceeding is that prior to imposition of sentence all semblances of judicial process are ignored and nullified by the rulings of the court denying the defendant's freedom to exercise his right to be heard. Although the district judge and the jury act as RUBBER STAMPS for the administrative agency that does not save the statute or the proceedings;

for indeed the tribunals, in the days when attainders flourished, were similarly misused.

In other words, the proceeding is to attaint the defendant charged with failing to report, contrary to the ordinary course of judicial proceedings. Whether an act of attainder be inflicted by the judgment of a court or by an act of a legislative or administrative body, it is the same. The difference between the judicial act of attainder by construction of the act and the legislative act of attainder consists only in the hand that inflicts it. It is a distinction without a difference.

The fact that in 1917 Congress did not provide for criminal prosecutions in the civil courts, but left the matter of enforcement of the Act in the hands of the military authorities, does not alter the fact that in the 1940 Act (which in this respect differs from that of 1917) such enforcement, as to persons who refuse to submit themselves to the military authorities as ordered, is placed exclusively in the jurisdiction of the United States District Courts. In this land there can be no justification for trial procedure contrary to that ordained by the Constitution. The duty of the courts to enforce wartime laws does not override the rights of every inhabitant of this land to be protected against denial of due process and to enjoy freedom from bills of attainder and *ex post facto* laws.

Framers of the Constitution of the United States were well aware of the unjust consequences that would inevitably flow from the use of attainders in this country. While at the time of the adoption of the Constitution some doubt was expressed as to the need for a specific prohibition on powers of Congress in this connection, to guard against the possibility of such a legislative usurpation of the judicial function, the *attainder* clause was enacted in its present form without opposition.[43]

[43] See *Debates on the Adoption of the Federal Constitution*, Jonathan Elliott, Washington, 1845, Vol. 5, p. 462; *The Federalist*, No. 44 (James Madison) and No. 84 (Alexander Hamilton).

The evil of an act of attainder is that it transfers the determination of criminal liability of citizens out of the exclusive jurisdiction of the courts[44] and vests in the legislature the uncontrolled prerogative to declare named individuals or designated classes of individuals to be criminal violators of certain laws and deprives the judiciary of its constitutionally assigned duty to interfere with those individuals' being so declared (i.e., 'framed') through form of law and, instead, imposes upon the courts the onerous task of judicially sanctioning the travesty.

Under this arrangement it is small wonder that the jury in the trial court found that the only "issue" they were to "decide" was obvious, being openly admitted by everyone in the courtroom before the jury retired to "consider" the evidence!

It is submitted that petitioners were the victims of this act of attainder, in which their guilt was conclusively predetermined by the draft board when acting as the executive agent of the legislature, and that now they languish in prison under a heavy criminal penalty without ever having been found guilty in a court of justice of violation of any law—except the act of attainder, which in truth and in fact is not a law under the United States Constitution.

The definition of crimes and the fixing of appropriate penalties is, of course, a proper legislative function. But when the legislature (or the executive authority) undertakes to promulgate a device whereby any specified individual or class of individuals can be *arbitrarily and summarily* declared guilty of violation of such law, then that law plainly is a bill of attainder. This peculiar characteristic makes such laws easily identifiable.

In the past "expurgatory oaths", so called, have been a favorite means of identifying the guilty class. Those unable or unwilling to subscribe to the oath were arbitrarily and

[44] "It is emphatically the province and duty of the judicial department, to say what the law is." MARSHALL, C. J., *Marbury* v. *Madison*, 1 Cranch 137.

summarily declared guilty without the benefit or protection of judicial review.

The trial court's construction of the Act in this case to justify petitioners' "convictions" as violators revives and sanctifies that ancient "expurgatory oath" technique. Those unable or unwilling to subscribe to the 'oath' are arbitrarily and summarily presumed and declared to be guilty of a violation of their lawful duty under the Act. The only crime alleged in the indictment and the sole issue to be proved on the trial is the fact that the 'oath' was not taken when ordered to be taken under the Act. If the jury finds such to be true, then the court imposes the statutory penalty.

Statutory exemption of petitioners from duty is a fact that vitally affects jurisdiction of the administrative agency. The Supreme Court admits that it is an issue which must be judiciously and judicially considered by the courts under the Act—but exercise of that right is denied until petitioners undergo a certain ceremony of induction. So to condition petitioners' free exercise of that right is to place the Selective Service Act in a singular position. A defendant's right of review through judicial inquiry into *jurisdictional facts* of a controversy decided by any other administrative agency is not thus proscribed and conditioned upon compliance with some irrelevant prerequisite; hence all of such agencies' reviewable functionings are constitutionally permissible.

But by permitting a conviction upon the mere showing of a failure to respond to the order to report for having administered to him the oath of induction the exempt person is pronounced guilty without any of the formal judicial safeguards ordinarily allowed in criminal proceedings, in exactly the same manner as judges in England proceeded under bills of attainder. If a law permits the legislature or the administrative agency to make a conclusive determination as to essential facts of guilt, namely, (1) the duty for service and (2) exempt status under the Act, it is the same as being

pronounced guilty in a legislative decree which is merely handed to the judiciary for execution, all of which is precisely in the fashion of English bills of attainder.

Thus it is again manifest that respective functions constitutionally prescribed for the present American Government's judicial, executive and legislative branches are wrongly intertwined, perverted and confused in a manner wholly un-American—pernicious and foreign to the orderly practice conceived and defined for each of the three branches by the framers of the Constitution. In such distorted setting the legislature is, as it were, put on a pedestal as "sovereign", the executive and judicial branches becoming its puppets, while the sovereign people play the role of serfs of the "sovereign" Legislature!

In the instant case, the construction given the Act makes the rules of reasonable doubt, presumption of innocence, etc., impotent and void, and entirely denies the real function of the jury to determine the facts of guilt of the defendant. Thus the Act deprives a certain class of citizens of their liberty without any of the judicial safeguards provided for the security of this land's every inhabitant in the courts; and it is, therefore, an act of attainder as harsh and cruel as those administered by the English despots of the 17th century.

As construed by the Supreme Court, the Act conclusively presumes the innocent and exempt defendant to be a felon unless he takes the 'expurgatory oath' through subjecting himself to the ceremony of induction. Then and only then—*after* obeying the command thus to subject himself —does he become endowed with the right to speak in his defense! Obviously this is a pernicious and wholly alien fallacy.

Both the Congress and the courts should know that to allow an exempt minister or a deferred conscientious objector the right to judicial review only upon taking of an oath that violates his conscience is tantamount to imposing pains

and penalties prohibited by the bill of attainder clause. It should be remembered that the law here does not provide for automatic induction into the armed forces after a certain time as did the 1917 Act. This was intentionally avoided by Congress. The induction act is contemplated as a voluntary act on the part of the individual. Thus to force one to unwillingly submit to induction as a condition to judicial review is nothing short of the tyrannical bill of attainder.

By construing the Acts as it has, the court sanctioned a legislative method of exercising criminal jurisdiction against a class of persons who are exempt and have no duty under the Act. The court has dispensed with the ordinary judicial forms and rules for the trial of one by indictment before a jury. The action of the court is the same as denying all of the affirmative defenses in murder and rape cases because the defendants "flouted the law", and providing that review would have been permitted by habeas corpus if the defendant had pleaded guilty or *nolo contendere*. For trial of indictments under the Act the court has done away with all the ordinary forms of legal precedents governing trials in criminal cases. Because of the contempt of the draft boards and failure of petitioner to obey the order, the court has taken away whatever advantages naturally accrue to petitioner under the highly protective system of law in the trial of criminal cases. By barring any judicial inquiry as to duty of an exempt person under the Act the court has approved the "star chamber" conviction of petitioner without any evidence of guilt or breach of duty being produced in court against him. Astonishing as it may seem, the court has solemnly decreed that the Federal judiciary cannot judicially recognize an accused citizen brought before it as entitled to the rights of a trial unless such person shows that he has taken what in effect becomes an "expurgatory oath" of induction and appears before the bar garbed formally as a ceremonially inducted national servant.

Can it be doubted that the requirement of reporting at a given time and place for the purpose of submitting to cere-

monial induction amounts to an "expurgatory" procedure that conclusively brings within the penalty of the statute a class of citizens unable or unwilling to submit thereto?

This particular mode of "expurgation", imposed by the opinion of the court, deserves brief consideration.

If the person or persons named in one of the English acts of attainder surrendered themselves to the King in obedience to his command, their action was regarded as an admission of guilt and they were punished according to the King's pleasure without the need of a judicial proceeding. Exactly similar is the situation in which petitioner found himself. By reporting for induction he must *ipso facto* surrender his civilian status and civil rights. So doing, he immediately becomes amenable to military law and for infractions thereof he is punishable at the pleasure of the military tribunals without recourse to the civil courts. The fact that he may have the right to petition the civil courts for a writ of habeas corpus does not save him from being penalized by the military tribunals. If he fails to file his petition for a writ of habeas corpus or is unsuccessful upon a hearing thereof, he may be subjected to any of many military penalties, which are much more severe than those prescribed by the questioned Act,[45] before he can appeal his civil case. Penalties thus incurred would be illimitable and irreparable regardless of appellate disposition of the habeas corpus application. There is no provision to stay military penalties pending an appeal from an order denying the petitions for writ of habeas corpus.

Before discussing cases it seems appropriate to consider further the historical background of such tyrannical laws. *The Catholic Encyclopedia*[46] inter alia states: "A Bill of Attainder may be defined to be an Act of Parliament for putting a man to death or for otherwise punishing him with-

[45] Violation of his new military obligations may subject the inductee to a sentence of death under Article 64 of the Articles of War (Sec. 1, ch. II, Act of June 4, 1920, 41 Stat. 787).

[46] Vol. 11, p. 59.

out trial in the usual form. Thus by a legislative act a man is put in the same position as if he had been convicted after a regular trial. . . . In the popular sense, however, the term 'Bill of Attainder' embraces both classes of acts, and in that sense it is evidently used in the Constitution of the United States, as the Supreme Court has declared in Fletcher v. Peck, 6 Cranch 138, that 'A bill of attainder may affect the life of an individual, or may confiscate his property, or both'. Such a bill deals with the merits of a particular case and inflicts penalties, more or less severe *ex post facto*, without trial in the usual form. While bills of attainder were used in England as early as 1321 in the procedure employed by Parliament in the banishment of the two Despensers (1 St. tr. pp. 23, 38), it was not until the period of passion engendered by the civil war that the summary power of Parliament to punish criminals by statute was for the first time perverted and abused."

Says the *Encyclopædia Britannica*:[47] "*Bills of Attainder*, in English legal procedure, were formerly a parliamentary method of exercising judicial authority. They were ordinarily initiated in the House of Lords and the proceedings were the same as on other bills, but the parties against whom they were brought might appear by counsel and produce witnesses in both Houses. . . . First passed in 1459, such bills were employed, more particularly during the reigns of the Tudor kings, as a species of extrajudicial procedure, for the direct punishment of political offences. Dispensing with the ordinary judicial forms and precedents, they took away from the accused whatever advantages he might have gained in the courts of law; such evidence only was admitted as might be necessary to secure conviction; indeed, in many cases bills of attainder were passed without any evidence being produced at all. In the reign of Henry VIII they were much used, through a subservient parliament, to punish those who had incurred the king's dis-

[47] Vol. 2 (1942 ed.), p. 656.

pleasure; many distinguished victims who could not have been charged with any offence under the existing laws being by this means disposed of."

Judge Cooley[48] said: "A bill of attainder was a legislative conviction for alleged crime, with judgment of death. Such convictions have not been uncommon under other governments, and the power to pass these bills has been exercised by the Parliament of England at some periods in its history, under the most oppressive and unjustifiable circumstances, greatly aggravated by an arbitrary course of procedure, which had few of the incidents of a judicial investigation into alleged crime. . . . Every one must concede that a legislative body, from its numbers and organization, and from the very intimate dependence of its members upon the people, which renders them liable to be peculiarly susceptible to popular clamor, is not properly constituted to try with coolness, caution, and impartiality a criminal charge, especially in those cases in which the popular feeling is strongly excited,—the very class of cases most likely to be prosecuted by this mode. And although it would be conceded that, if such bills were allowable, they should properly be presented only for offenses against the general laws of the land, and be proceeded with on the same full opportunity for investigation and defense which is afforded in the courts of the common law, yet it was remembered that in practice they were often resorted to because an obnoxious person was not subject to punishment under the general law, or because, in proceeding against him by this mode, some rule of the common law requiring a particular species or degree of evidence might be evaded, and a conviction secured on proofs that a jury would not be suffered to accept as overcoming the legal presumption of innocence. Whether the accused should necessarily be served with process; what degree or species of evidence should be required; whether the rules of law should be followed, either in determining what constituted a crime, or in dealing with the accused

[48] *Constitutional Limitations*, 8th ed., Vol. 1, pp. 536-539.

after conviction,—were all questions which would necessarily address themselves to the legislative discretion and sense of justice; and the very qualities which are essential in a court to protect individuals on trial before them against popular clamor, or the hate of those in power, were precisely those which were likely to prove weak or wanting in the legislative body at such a time. And what could be more obnoxious in a free government than the exercise of such a power by a popular body, controlled by a mere majority, fresh from the contests of exciting elections, and quite too apt, under the most favorable circumstances, to suspect the motives of their adversaries, and to resort to measures of doubtful propriety to secure party ends?

"Nor were legislative punishments of this severe character the only ones known to parliamentary history; there were others . . . called bills of pains and penalties . . . ; and the term 'bill of attainder' is used in a generic sense, which would include bills of pains and penalties also. . . .

"The conviction of the propriety of this constitutional provision has been so universal, that it has never been questioned, either in legislative bodies or elsewhere. Nevertheless, cases have recently arisen, growing out of the attempt to break up and destroy the government of the United States, in which the Supreme Court of the United States has adjudged certain action of Congress to be in violation of this provision and consequently void."

Judge Story[49] says: "In such cases, the legislature assumes judicial magistracy, pronouncing upon the guilt of the party without any of the common forms and guards of a trial, and satisfying itself with proofs, when such proofs are within its reach, whether they are conformable to the rules of evidence or not. In short, in all such cases, the legislature exercises the highest power of sovereignty, and what may be properly deemed an irresponsible despotic discre-

[49] *Commentaries on the Constitution of the United States* (Bigelow, 1891), Vol. 2, p. 216, s. 1344.

tion, being governed solely by what it deems political necessity or expediency and too often under the influence of unreasonable fears or unfounded suspicions. . . . The punishment has often been inflicted without calling upon the party accused to answer, or without even the formality of proof; and sometimes, because the law, in its ordinary course of proceedings, would acquit the offender. The injustice and iniquity of such acts, in general, constitute an irresistible argument against the existence of the power. In a free government it would be intolerable; and in the hands of a reigning faction, it might be, and probably would be, abused to the ruin and death of the most virtuous citizens. Bills of this sort have been most usually passed in England in times of rebellion, or of gross subserviency to the crown, or of violent political excitements; periods in which all nations are most liable (as well the free as the enslaved) to forget their duties, and to trample upon the rights and liberties of others."

It cannot be argued that because the *locus in quo* of the proceedings were in the judicial arena or a place called a court such fact would prevent the act from being such an unconstitutional law. The presence of a judge, disrobed of his judicial powers, and the attendance of a jury, subservient to the court's charge that they cannot inquire into the innocence of the defendant, does not take the law, as construed, out of the condemnation pronounced by the writers of the Constitution speaking for the people of these United States. The usual instruments of justice may easily become the instruments and agency of a tyrannical legislature in such proceedings, as is clearly demonstrated in the record of this case. All judicial powers and institutions of justice were literally thrown to the winds to accomplish the demands of expediency.

The court has had previous occasion to examine the unconstitutionality of bills of attainder. The most famous case is that of *Cummings* v. *Missouri*.[50] Cummings, a Roman

[50] 4 Wall. 277.

Catholic priest, was prosecuted under provisions of the Missouri Constitution making it mandatory for all preachers, priests and ministers to subscribe to an oath regarding their past affiliation with the Confederacy. Cummings refused to take the oath, was prosecuted and finally appealed to the Federal Supreme Court. The fact that the bill of attainder proceedings against him under the state constitution and statutes were instituted and prosecuted in a Missouri court did not prevent nullification of the conviction because of its repugnancy to the Federal Constitution prohibiting states from passing bills of attainder. The court[51] said: "We do not agree with the counsel of Missouri that 'to punish one is to deprive him of life, liberty, or property, and that to take from him anything less than these is no punishment at all.' . . . The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact. . . .

" 'Some punishments,' says Blackstone, 'consist in exile or banishment, by abjuration of the realm or transportation; others in loss of liberty by perpetual or temporary imprisonment. Some extend to confiscation or forfeiture of lands or both, or of the profits of land for life; others induce a disability of holding offices or employments, being heirs, executors and the like.'

" . . . Any deprivation or suspension of any of these rights for past conduct is punishment, and can in no otherwise be defined. . . .

"It was against the excited action of the States, under such influences as these, that the framers of the Federal Constitution intended to guard. In *Fletcher* v. *Peck,* 6 Cranch 137, Mr. Chief Justice Marshall, speaking of such action, uses this language: 'Whatever respect might have been felt for the State sovereignties, it is not to be disguised that the framers of the Constitution viewed with some apprehension the violent acts which might grow out of the

[51] 4 Wall. 320-332.

feelings of the moment, and that the people of the United States, in adopting that instrument, have manifested a determination to shield themselves and their property from the effects of those sudden and strong passions to which men are exposed. . . . '

"A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

"If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties. In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge. It assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, without any of the formal safeguards of trial; it determines the sufficiency of proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence. . . .

"These bills are generally directed against individuals by name; but they may be directed against a whole class. . . . These bills may inflict punishment absolutely or may inflict it conditionally.

"The bill against the Earl of Clarendon, passed in the reign of Charles the Second, enacted that the earl should suffer perpetual exile, and be for ever banished from the realm; and that if he ever returned, or was found in England, or in any other of the King's dominions, after the first of February, 1667, he should suffer the pains and penalties of treason, with the proviso, however, that if he surrendered himself [reported for induction] before the said first day of February for trial, the penalties and disabilities declared should be void and of no effect. (Printed in 6 *Howell's State Trials,* p. 391.) [Bracketed words added]

" 'A British Act of Parliament,' to cite the language of the Supreme Court of Kentucky, 'might declare that if cer-

tain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors. Such an act comes precisely within the definition of a bill of attainder, and the English courts would enforce it . . . ' (*Haines* v. *Buford,* 1 Dana 510)

"If the clauses of the second article of the Constitution of Missouri, to which we have referred, had in terms declared that Mr. Cummings was guilty, or should be held guilty of having been in armed hostility to the United States, or of having entered that State to avoid being enrolled or drafted into the military service of the United States, and therefore should be deprived of the right to preach as a priest of the Catholic Church, or to teach in any institution of learning, there could be no question that the clauses would constitute a bill of attainder within the meaning of the Federal Constitution. If these clauses, instead of mentioning his name, had declared that all priests and clergymen within the State of Missouri were guilty of these acts, or should be held guilty of them, and hence be subjected to the like deprivation, the clauses would be equally open to objection. And, further, if these clauses had declared that all such priests and clergymen should be so held guilty, and be thus deprived, provided they did not, by a day designated, do certain specified acts [report for induction], they would be no less within the inhibition of the Constitution. [Bracketed words added]

"In all these cases it would be the legislative enactment creating the deprivation without any of the ordinary guards provided for the security of the citizen in the administration of justice by the established tribunals.

"The results which would follow from the clauses of the character mentioned do follow from the clauses actually adopted. The difference between the last case supposed and the case actually presented is one of form only, and not of substance. The existing clauses presume the guilt of the

priests and clergymen, and adjudge the deprivation of their right to teach or preach unless the presumption be first removed by their expurgatory oath—in other words they assume the guilt and adjudge the punishment conditionally. The clauses supposed differ only in that they declare the guilt instead of assuming it. The deprivation is effected with equal certainty in the one case as it would be in the other, but not with equal directness. The purpose of the lawmakers in the case supposed would be openly avowed; in the case existing it is only disguised. The legal result must be the same, for what cannot be done directly, cannot be done indirectly. The Constitution deals with substance, not shadows. Its inhibition was levelled at the thing, not the name. It intended that the rights of the citizen should be secure against deprivation for past conduct by legislative enactment, under any form, however disguised. If the inhibition can be evaded by the form of the enactment, its insertion in the fundamental law was a vain and futile proceeding.

" . . . This deprivation is punishment, nor is it any less so because a way is opened for escape from it by the expurgatory oath. The framers of the Constitution of Missouri knew at the time that whole classes of persons would be unable to take the oath prescribed. To them there would be no escape provided; to them the deprivation was intended to be, and is, absolute and perpetual. To make the enjoyment of a right dependent upon an impossible condition is equivalent to an absolute denial of the right under any condition, and such denial, enforced for a past act, is nothing less than punishment imposed for that act. . . .

" . . . They impose the same penalty, without the formality of a judicial trial on conviction; for the parties embraced by the supposed enactments would be incapable of taking the oath prescribed; to them its requirement would be an impossible condition . . . "

IN THE CASES AT BAR denial of petitioners' right to present their defense (guaranteed by due process) for declining to

take the "expurgatory oath" through submitting to ceremonial induction, is absolutely indistinguishable from the denial of liberty of the priest Cummings for refusing to take the prescribed oath.

With the passing of time, *enlightened* mankind has become so far removed from the prevailing recognized use of bills of attainder in England that it is easy for modern man to meet up face to face in the middle of the road with a streamlined twentieth-century bill of attainder and be unable at once to recognize it as the type condemned by the founding fathers, especially when it is tied onto a war law.

One of the most notorious acts of attainder was that passed by Parliament in the 17th century against the Earl of Strafford (Thomas Wentworth) because of his supposed acts of treason.[52] History shows that the bill of attainder enacted by Congress (according to this court) so as to deny the right to be heard in the defense to indictments affecting many hundreds, if not thousands, of persons, is comparable to the aforesaid bill of attainder prosecuted against the Earl of Strafford. It was such an outrage committed in the name and by the authority of the King and Parliament that official efforts were made to expunge the proceedings from the record. Wooddeson[53] says: "The bill of attainder was a private act, and is preserved for our inspection only perhaps by Rushworth in his account of the trial. For the reversing statute (which is placed, whether properly or not, among the public acts) ordained that all records and proceedings of parliament relating to the said attainder, should be wholly cancelled and taken off the file or otherwise defaced and obliterated, to the intent the same might not be visible in after ages, or brought into example to the prejudice of any person whatsoever."

The Act as construed also smacks of *ex post facto* iniquity. Each draft board has been empowered by the court

[52] *Famous Trials of History*, Birkenhead (Doubleday, Doran & Co., New York, 1926), Vol. 1, pp. 33-47.

[53] *A Systematical View of the Laws of England*, Lecture XLI, p. 633.

to conclusively deny existence of facts which show the board has no jurisdiction and, also, to find an exempt person liable for duty. Congress said in 1940, when passing the Act, that such persons have no duty. In 1944, by the construction placed on the Act, the court confers upon the boards the authority to conclusively and finally interpret the provisions of the statute for exempting ministers, Section 5 (d) of the Act. Persons thus specifically exempted are later, through arbitrary fiat by a local board, declared to be within the anathema of the criminal sanctions clause. Since such construction of the statute by the local boards is binding upon the courts, an innocent person may be punished for an act not even interdicted by a written law of Congress. Not many years ago the court[54] said: "A statute, therefore, which imposes heavy penalties for violation of commands of an unascertained quality, is in its nature somewhat akin to an *ex post facto* law since it punishes for an act done when the legality of the command has not been authoritatively determined. Liability to a penalty for violation of such orders, before their validity has been determined, would put the party affected in a position where he himself must at his own risk pass upon the question."

In the *Cummings* case the court quotes with approval the opinion by the Court of Appeals of Kentucky in the case of *Gaines* v. *Buford,* 1 Dana 481, where the legislature enacted that unless the owners of certain lands situate in the commonwealth should before the 1st day of August, 1823, make certain improvements, the title should forfeit and immediately vest in the commonwealth, without judgment or office found. In passing on that act Judge Nicholas said, "To enjoin what shall be done or what left undone, and to secure obedience to the injunction by prescribing appropriate penalties, belong exclusively to legislation. To ascertain a violation of such injunction and inflict the penalty belongs to the judicial function.

"So far as the act in question undertakes to divest

[54] *Wadley Southern R. Co.* v. *Georgia,* 235 U. S. 651, 662.

Gaines of his title and vest it in the state, it is a legislative infliction of the penalty; it is an assumption to that extent of judicial magistracy without affording the accused the benefit of those forms and guards of trial which are his constitutional right wherever a citizen is sought to be punished, either in his person or by forfeiture of his property, for alleged violations of the penal enactments of the state. The right to forfeit is merely an incident to the power to punish guilt. Without guilt the forfeiture can not be incurred. The guilt can not be ascertained by the legislature, nor otherwise than by a direct criminal procedure of some sort and a judicial determination thereon."[55]

Later the Kentucky Court of Appeals had for consideration another Act of the commonwealth which was declared void because a bill of attainder. That was in *Kentucky* v. *Jones,* 10 Bush (70 Ky.) 725. Pursuant to a new constitutional provision the state legislature passed a law which required a person elected or appointed to public office to take an oath that he had not participated in a duel. The Act also established *boards of contest,* administrative agencies, whose findings were made final by statute in all controversies decided by them under the Act. If a person was found by such board to be disqualified by reason of having fought a duel it was provided that his thereafter taking office or continuing to hold office in violation of the finding and order of the administrative agency constituted a crime under the Kentucky statutes. Jones had been declared by one of these boards to have fought a duel. He continued to

[55] An interesting bill of attainder which is very similar to that contained in the criminal sanctions clause of the Act and Regulations as construed here is found in Henings Statutes at Large, Virginia, Vol. 9, p. 463-464. It was enacted by the commonwealth's legislature to attaint one Josiah Philips of Princess Anne County who was alleged to be a leader of a formidable and dangerous band of robbers who had joined the King's forces during the revolution. It commanded him and his men to report and upon failure to report at a time and place fixed they were to be penalized as per terms of the bill. See also report of this bill in Watson's *The Constitution of the United States* (Callaghan & Co., Chicago, 1910), Vol. 1, pp. 736-737.

hold office in spite of the order of the board. The commonwealth instituted criminal proceedings. He was indicted in two counts. One charged that he continued to hold office after he had been declared disqualified by the board of contest. The other charged that he illegally usurped the office in violation of the statute. In declaring the Act invalid the Court of Appeals, *inter alia,* said:

"In support of the first count it is argued that the ineligibility or disqualification for office prescribed by the Constitution arises immediately out of the commission of the forbidden acts [i.e., taking office]; that it attaches at once and is in no wise dependent upon a judicial ascertainment of the existence of the disqualifying fact [i.e., fighting a duel]. If this be the true construction of section 20 of the Constitution, it is self-executing . . . it tries without accusation, hears and determines without proof or opportunity for defense, and imposes the penalty without notice to the culprit of his condemnation . . . "

Applying the reasoning of the court in the *Buford* case, supra, the court, continuing, said: "it will be seen at once that the construction converts that section into a bill of pains and penalties, and thereby makes it repugnant to that cause of the federal constitution which provides that 'no state shall pass any bill of attainder.' . . . Here it is insisted that Jones did a given act, criminal in its nature, and that therefore he should be deemed to be and treated as a convicted offender, and that the courts should enforce the prescribed penalty without indictment and without trial by jury."

Concerning the count charging violation of the order of the board of contest the court said: "The statute created a 'contest' board, whose decision shall be final—binding and conclusive on the courts . . .

" . . . when the courts are called upon to enforce the judgments of the board, or to punish those who disobey its mandates, they have the power to inquire into and deter-

mine as to its jurisdiction in the particular case in hand. Without jurisdiction to act, the finding and judgment of any board or tribunal is necessarily void, and may be so treated by all the world. . . . We are of opinion that a contesting board cannot thus try and convict a citizen of a penal offense, and by its judgment inflict upon him a punishment of any kind, criminal or political. . . .

"To admit that a contesting board may determine finally as to what constitutes legal disqualification for office would be to decide that the legislature, instead of confining these tribunals to the discharge of executive duties, and to the determination primarily of mere questions of fact, had, in disregard of the powers of government, existing by virtue of the first article of the constitution, created a high judicial tribunal—a court with powers and authority to determine finally and conclusively questions of individual rights arising under the constitution—and provided that it should be composed exclusively of high executive officers.

"It is a matter of great difficulty to draw the exact line of demarcation between executive and judicial powers and of still more difficulty to define with accuracy how far executive officers or ministerial duties, may bind the other departments of government by the exercise of quasi judicial functions. But we regard it as an indisputable proposition that where the inquiry to be made involves questions of law as well as fact, where it affects a legal right, and where the decision may result in terminating or destroying that right, the powers to be exercised and the duties to be discharged are essentially judicial, and are such as cannot constitutionally be delegated to or imposed upon executive officers."

In the case styled *In re Yung Sing Hee* (Circuit Court, Oregon) 36 F. 437 (1888), the petitioner, a Chinese woman, alleged that she was a citizen of the United States, had gone to China and when seeking re-entry she was excluded because the collector of customs, under the statute, had found her to be an alien. The court held that, although the ad-

ministrative action had been taken pursuant to Act of Congress, an act which undertakes to inflict punishment of banishment or exile from the United States of a citizen is a bill of attainder. In *Davis* v. *Berry*, 216 F. 413, a statute of Iowa was declared to be a bill of attainder and void. The statute provided that whoever shall be twice convicted of a felony shall upon a hearing and determination of the prison surgeon be required to undergo an operation of "vasectomy". The act did not provide for judicial trial. The court said: "The hearing is by an administrative board or officer. There is no actual hearing. There is no evidence. The proceedings are private. The public does not know what is being done until it is done. Witnesses are not produced, or, if produced, they are not cross examined. What records are examined is not known. . . . There are inquiries that must be held in the open with full opportunities to present argument for and against. . . . But assuming that prior convictions all appear of record, . . . nothing remains for the prison physician to do but to execute that which is already of record, then the statute becomes a bill of attainder.[56]

It is asserted by the friends of the bill of attainder found in the criminal sanctions clause of Section 11 of the Selective Training and Service Act of 1940 that the usual criminal defenses should be denied to defendants prosecuted under the act in order to raise an army and navy and that since men were automatically inducted under the 1917 Act without the right of a previous hearing in the courts that the same method of handling cases under the 1940 Act had proved to be a deserving instrument of the nation for the discouraging of delinquencies and the promotion of criminal justice. The courts cannot assent to this declaration. The Spanish Inquisition may have used similar methods and sophistries but it can be confidently asserted that neither the Spanish Inquisition nor the Inquisition of Queen Elizabeth did go any further or employ a more cunning

[56] See *Green* v. *Shumway*, 39 N. Y. 423; *Pierce* v. *Carshadon*, 16 Wall. 234.

device than that employed by the government in the prosecution of Selective Service cases.[57]

Remarkable it is that scarcely any person undertakes to defend the method of trying defendants charged with failing to report under the Act without insisting that this is a war measure and that one who fails to report is to be regarded as the "domestic rebels" of medieval times with no rights under the law or Constitution and that the crime is of such an odious nature that it has worked a forfeiture of even those rights which peculiarly belong to criminals. It is noticed that the Constitution guarantees one charged with treason, the highest crime, with a right to a judicial trial. It is said that Jehovah's witnesses who fail to report for induction are nothing more than criminals. It may, for the sake of argument only, be conceded that they are such. Are they not, as such, entitled to the benefit of all the laws made for criminals? If not so, who, may it please the court, are entitled to the benefit of the laws made for criminals? The innocent have no use for them; and if the guilty have no claim on the rights conferred by these laws, then they are mere nullities.

Reasoning of Wooddeson[58] is quite appropriate: "The defense of bills of attainder relies much on the supposition of what is rarely true, and still more rarely can be proved, as it ought, tho true, that the safety of the state essentially depends on the death of the particular offender. What

[57] In 1252 Innocent IV, pope, said: "When those adjudged guilty of heresy have been given up to the civil power by the bishop or his representative, or the Inquisition, the podesta or chief magistrate of the city shall take them at once, and shall, within five days at the most, execute the laws made against them." (See "Inquisition", *The Catholic Encyclopedia*, Vol. VIII, pp. 26-38.) "The civil authorities, therefore, were enjoined by the popes, under pain of excommunication to execute the legal sentences that condemned impenitent heretics to the stake." *Ibid.*, p. 34. Read also in *Encyclopædia Britannica* (1942), Vol. 12, pp. 377-383; *The Encyclopedia Americana* (1942), Vol. 15, pp. 147-148. These sources show that the proceedings in the judicial courts, after the order and findings of the administrative agency (the ecclesiastical court) had been made, were identical to the proceedings in the district courts under the Selective Training and Service Act against one who is alleged to have failed to report.

[58] *A Systematical View of the Laws of England*, p. 644.

traitor, when discovered, can be so formidable? what people so insecure? But if we were to agree with Caffius in his assertion, *'habet aliquid ex iniquo omne magnum exemplum, quod contra fingulos utilitate publica rependitur,'* still it is exploded casuistry to support by its expediency what is allowed to be unjust."

That the Selective Training and Service Act of 1940 was adopted and adapted in the heat of impending war and a great emergency does not change it from being penal in Section 11. That the penal provision, as construed, has taken away for the contempt of the administrative agency the most valuable of all the liberties of the citizen must be admitted by all. That the draft boards have assumed judicial magistracy, deciding questions of law and innovating on the crime must be conceded. That the rules of evidence and proofs and of judicial trial have been abrogated must be admitted. That it has instituted a modern-day inquisition trial authorizing a summary method of punishing the modern-day "domestic rebels" cannot be denied, not allowing them the benefit of criminal laws.

Under the construction placed on the Act and Regulations it must be understood that the government has claimed for the draft boards of the Selective Service System omnipotent powers and that they have been emancipated of all judicial restraint when dealing with a *criminal* under the Act; that is to say, one who had the conviction and courage to defy the illegal order of a board. The scope of this argument and the constriction thus placed on the Act and regulations must be denounced as breathing the worst spirit of the worst men in the worst times of history. Such has been the tyrant's plea from the beginning of the history of the world. It was the claim of the first dictator, Nimrod. An Athenian Assembly or a Roman Senate in its lowest state of decadence never set up larger pretensions, nor did either ever announce a more unqualified tyranny.

Go and examine the history of the rise to power of all the dictators of the present day and those of antiquity and

it will be found that a stronger party of armed men conquered and bore down a weaker party, and followed this conquest by laws which perpetuated their power. Perhaps the weaker party had been guilty of flagrant crimes. Perhaps their crime was simply being in the minority. But was it right to set up over either guilty or innocent the iron rule of arbitrary government? Is there any justification for taking away the liberties of the people? Is popular government "of the people, by the people and for the people" right or is it wrong? Is it the theory of this government that when a portion of the people, such as the Quakers and others, who have conscientious objections to participation in war in any form, or the conscientious minister of the gospel who is bound by a solemn covenant with his Maker to "feed the sheep of the flock" of God, and who cannot violate their consciences and oaths by reporting for induction, shall be attainted, disfranchised, and cast out of its pale, by an act of the majority? And, when, among those who remain another war shall occur or emergency arise and other minorities, for various causes, be cast out until none remain, but a few aristocrats, whose power has been cemented by blood, terror and tyranny?

It was the intention of the founding fathers that the states and nations were to be noble institutions, proclaiming and guarding the liberty of their people. With any other definition it is anything that tyrants make it. Germany, Russia and Japan are states and doubtless exert the power of self-preservation over the liberties of the people. There is no such maxim of American liberty as safety of the State. But the motto of this nation is, on the contrary—*salus populi suprema lex*—the safety of the people is the supreme law—and no state or nation is worth preservation, even for a moment, which does not cherish this motto.

To one unacquainted with the history of man, it seems to him needless to raise a barrier against injustice so palpable as perpetrated here. In one who knows what that history is

(and the writers of the Constitution were deeply acquainted with history) it would be criminal not to provide every guard which the profoundest wisdom may suggest. In all the ages of the world, in all the phases of history, under every relation in which the individual has been called to act —amid all the combinations, social, political, religious, into which men have entered—the worst enemy of man or his race has been the natural lust of the rulers for power.

But where are the republics of history which have so repeatedly and so boastfully proclaimed themselves as champions of liberty? Buried in untimely graves which the factions and rulers have digged. The individual claiming for himself an individual right to liberty of conscience in these nations has been swift to deny the same right to his brother. Exulting in the freedom of his own intellect, and pertinaciously resisting every effort to enslave his own thoughts, he has constantly endeavored to destroy the happiness and crush the right to this liberty in others. It is in such contests that the earth has been filled with misery, and the very altars of the great recognized religions bathed in the blood of contending factions with which they joined hands.

Mr. Adams was led to exclaim, "Of all the spirit that we read out of hell this is the last that any enlightened friend of liberty would wish to inculcate." The facts gathered from the ancients and medieval times were quite sufficient to justify this expression. In the language of Mr. Adams we ask, 'In the name of human and Divine benevolence, is this the government under which we live? Are there no constitutional restraints that may be legally invoked against such enactments? Is it possible that the legislatures are prohibited from passing such laws, but that a court, not subject to popular vote, may construe a law so as to invest the draft boards with omnipotent and unchecked powers? If so, then what are the liberties of the people worth, which may be swept away by every passing breath of prejudice or popular feeling?' This condition was not envisioned by the great men who framed the Constitution as permissible.

The founding fathers were wise men and they labored in their day for the good of their race and posterity. They enjoyed peculiar advantages for the work which fell to their lot. They had been tried in the school of adversity. They had felt the rod of the tyrant, and knew what oppression was. It was their mission to protect their people, who were few and weak, against the many and the strong, and established the fitting guards for liberty under all circumstances. The mission of the present generation is different. The people and the courts are to restrain the excessive indulgence of their own power. They are to hold back the revengeful career of a victorious party, and resist the tempting occasion of becoming tyrants themselves. They are to be generous to the fallen, and just to liberty and to mankind. They have no bulwarks to erect for freedom. They need only preserve and defend such as they have.

The founders of American liberty knew that parties and violent party excitements would belong to the government they established—that that was a consequence of liberty. But they knew when men are dispassionate they are rarely cruel; that when they are disinterested they are generally just. Their care was to provide such checks and balances as would give passion time to cool, avoid hasty action, invite reflection, secure deliberation and intelligence in the enactment of the laws, and prevent, by separation of powers those extensive combinations by which alone the administration can be rendered subservient to the will of a mere popular faction—the most deplorable of all the evils which can possibly befall a free State. They believed that there can be no liberty where the legislative and executive powers are united in the same person or body of magistrates, or if the power of judging be not separated from the legislative body; that it should then be presented to and be considered and approved by another legislative body; that it should then undergo the scrutiny of another independent department before it took the name of law; and that the

judicial powers should belong only to the courts of law and not to the administrative agencies.

And now great questions arise and demand a settlement: What is the Constitution? Have we any Constitution? If we have, does it contain guarantees of liberty? Does it any longer secure a judicial trial in a criminal case or the ordinary course of judicial proceedings in criminal cases? Has any one who is charged with crime a right to hearing and proofs of guilt? Is it now the fact that life, liberty, property and the pursuit of happiness are held only by the feeble tenure of popular passion and prejudices? Are the people henceforth to be victimized by legislative and administrative judgments, *ex post facto* laws, bills of attainder and inquisitorial processes emanating from such agencies, until, like so many other republics, the people are sunk into the depths of misery and suffering?

These questions are presented to the nation and this court. The Act and Regulations under consideration assume powers destructive of liberty. The solution is forced at last into this court. This court is solemnly invoked to perform the duty for which it was created. The judiciary holds in its hands the liberties of the people. It is firmly believed that this court will perform its office; and that it will not abandon the Constitution to any faction that assumes arbitrary powers. It is submitted that the court should hold that the Act and Regulations as construed are bills of attainder and of pains and penalties.

FOUR

The Act and Regulations have been construed so as to deny the exempt registrant the right to a judicial trial, to urge his defense of no duty under the Act, to prove his innocence and to a jury trial on the elements of the offense, contrary to the Third Article, the due process clause of the Fifth Amendment and to the Sixth Amendment, United States Constitution; therefore the court should exercise its discretion and grant the writs of certiorari because the court below erred in overruling the motions raising this issue.

These issues under this point are thoroughly argued under Point Three of Petitioners' Brief filed in the companion cases of *Lohrberg* v. *Nicholson* and *Falbo* v. *Kennedy*. For the sake of saving the court's time and to avoid a repetition of those arguments here they are incorporated herein by reference as though copied at length herein.

Although these principles of constitutional law were drawn to the attention of this Court in the *Falbo* case the constitutional question was not directly presented by assignment of error and was not raised in that record. It must be assumed that the Constitutional question was not disposed of in that case because it ignores all of the many cases under the due process clause which reveal that judicial review be granted of administrative actions in order to protect due process. The fact that this Court does not discuss in its opinion any of these cases and does not expressly overrule them is persuasive that the issue was not passed upon. If the constitutional question was considered it seems that the court would have distinguished the cases in its opinion or would have overruled them so as to leave some standard for the lower courts and the bar to be guided

by as to the scope and effect of its opinion. Having failed to do this it is urged here that this court can and should properly consider the many decisions cited and quoted from, and upon the argument made it is respectfully submitted that the statute as construed and applied should be declared to be unconstitutional for the above reasons.

FIVE

The trial court committed reversible error in holding that each petitioner could not show, and that the jury could not consider, whether the draft boards had acted in excess of their authority, arbitrarily and capriciously and contrary to the evidence showing petitioner exempt, all of which was in such a manner as to violate the rights of petitioner and deny him his liberty without due process of law, contrary to the Fifth Amendment to the United States Constitution; therefore the court should exercise its discretion and grant the writs of certiorari.

This point has been thoroughly argued under Point Two of the brief filed in behalf of Petitioners in the companion cases of *Lohrberg* v. *Nicholson* and *Falbo* v. *Kennedy*. For the sake of saving the court's time and to avoid a repetition of those arguments here they are incorporated herein as though copied at length herein.

It is contended by the government in these cases that the decision in the *Falbo* case has definitely cut out any possible consideration of these questions here. It is submitted that when the *Falbo* decision and opinion are considered for only what they decided—namely, the narrow question there presented—the opinion is inescapable that it does not control the question here presented. Here there is urged that the acts and conduct of the local boards were shown to have violated the constitutional rights of the petitioners, that is

to say, the boards had violated the due process clause of the Fifth Amendment. There was no such challenge in the *Falbo* case. It may be considered that the *Falbo* decision does not overrule this court's decisions in the *Goff* and *Honaker* cases insofar as they authorize review of actions of the board alleged to be in violation of the constitutional rights of the registrant. Also there is involved here a violation of the procedural regulations by the board.

The fact that in these cases the petitioners challenge the action of the draft boards as being in violation of the Constitution sufficiently distinguishes the *Falbo* case to require a reversal of the judgment of the courts below upon the Supreme Court cases cited which have not been overruled.

SIX

The trial court committed reversible error in failing to grant the motion for a directed verdict at the close of all the evidence made in behalf of petitioners because the undisputed evidence showed that the Local Boards, the Boards of Appeal, and the State Director had violated the constitutional rights of said petitioners and acted contrary to the Act and Regulations and the due process clause of the Fifth Amendment to the United States Constitution by entirely disregarding and failing to consider petitioners' evidence, which established their exemption from duty under the Act and by classifying them as liable for duty under the Act and Regulations; therefore the court should exercise its discretion and grant the writs of certiorari.

The questionnaire in each case showed that each petitioner was an ordained minister of a recognized religious organization, Jehovah's witnesses, of which the Watchtower

Bible and Tract Society, Inc., a corporation organized to preach the gospel, is the legal governing body. In each case it is shown that each is recognized by the Society and Jehovah's witnesses as apt and fit to teach and preach and that each has a certificate of ordination. The undisputed evidence showed that each was devoting full time to preaching the gospel as an ordained minister. The undisputed evidence shows that each came squarely within the definition of an ordained minister of Jehovah's witnesses promulgated by the National Director in his Opinion No. 14 concerning the ministerial status of Jehovah's witnesses. This opinion is set forth verbatim in requested instruction No. 18, appearing in the *Clayton* APPENDIX, pp. 57-60.

The District Judge expressly stated in the *Clayton* case that if the case had been tried under the rule announced in the *Goff* and *Honaker* cases and prior to the Supreme Court's decision of the *Falbo* case he would have been compelled to direct a verdict in favor of the defendant, Clayton. For the illegal action of the draft boards he was constrained to fix a very light sentence of ten days in the custody of the Attorney General. See the discussion of the District Judge on this matter. (Ap. C. pp. 74-76) For the same reason he refused to assess a heavy sentence in the *Stull* case. In the *Stull* case he also sentenced petitioner to serve a term of ten days in the custody of the Attorney General. (Ap. S. p. 55) The conclusion of the trial judge as to the arbitrary and capricious action of the draft boards is supported by the record in each case.

The questionnaire was the only thing admitted in evidence in each case which related to the ministerial status of each petitioner on all the evidence before the boards showing petitioners to be ministers of religion within the meaning of Section 5 (d) of the Act. (See Ap. C. pp. 12-16; Ap. S. pp. 6-10.) There was nothing in the entire file of either petitioner which disputed the claim and statements shown in the questionnaire that they were ministers. The

trial judge so stated in reference to each petitioner at the time of pronouncing sentence upon each. (See Ap. C, pp. 74-76; and Ap. S. p. 55.)

It is manifest that the administrative agency did not give a hearing as that term is contemplated within the meaning of the decisions governing due process of law in such cases. Mr. Chief Justice Hughes in *Shields* v. *Utah Idaho C. R. Co.*, 305 U. S. 177, at page 182 said "The requirement of a 'hearing' has obvious reference 'to the tradition of judicial proceedings in which evidence is received and weighed by the trier of the facts'. The hearing is 'the hearing of evidence and argument'. *Morgan* v. *United States*, 298 U. S. 468, 480. And the manifest purpose in requiring a hearing is to comply with the requirements of due process upon which the parties affected by the determination of an administrative body are entitled to insist. *Interstate Commerce Comm'n* v. *Louisville & Nashville R. Co.*, 227 U. S. 88, 91. The Commission is not only authorized but 'directed' to give the hearing and make the determination when requested." In *Morgan* v. *United States*, 298 U. S. 468, at pages 479-481, *inter alia*, Chief Justice Hughes said: "If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given." In the same case on a subsequent appeal the Chief Justice held that the hearing is an exorable safeguard. 304 U. S. 1, 14, 15.

It seems clear that the action of the board in ignoring the plain and undisputed evidence before them violated the constitutional rights of petitioners in both cases so as to require a directed verdict on the ground that the action of the agency was in violation of the Constitution.

Therefore it is proper and necessary that the court, on the basis of the questionnaires, offered and received in evidence and which were before the local boards, set aside the verdict and reverse the judgments of the court below; and instead of directing a new trial order that the indictments be dismissed.

This is especially true here where the record shows that the indictment is based upon an unconstitutional order. It is a fundamental rule that if the undisputed evidence shows that the petitioner is not guilty of the offense charged and that upon another trial the evidence would be substantially the same or could not be different, it is the duty of the appellate court to reverse and dismiss the indictment rather than order a new trial. *Smith* v. *United States*, 150 U. S. 50; *Baltimore Carolina Line* v. *Redman*, 295 U. S. 654. It is plain from a perusal of the many documents and other evidence excluded that it is impossible for the government to show that the order was not based upon a void order, because the undisputed evidence shows that it was void.

SEVEN

The trial court committed reversible error in holding that Thomas Howard Stull could not show, and that the jury could not consider, whether the Nicholas County local board and its appeal board had violated the Act and Regulations and the due process clause of the Fifth Amendment by making prejudicial and malicious statements against petitioner Stull which disqualified them to act (causing a change of his classification from 4-D to 1-A, after the file had been transferred to the Greenbrier County local board) which statements prejudiced the Appeal Board and the State Director to such an extent as to disqualify them from acting and to the injury of petitioner; therefore the court should exercise its discretion and grant the writs of certiorari.

In the *Stull* case an effort was made to show by offering certain evidence which was excluded that showed the members of the Nicholas County local board and the appeal agent at various times and in devious ways expressed,

orally and in writing, their prejudice against Thomas Howard Stull, which not only demonstrated that they were disqualified to act in connection with petitioner's claim for exemption and his status under the Act and Regulations but which also so permeated the entire proceedings before the Board of Appeal and the State Director as to violate the procedural rights of said Stull under the Regulations, the Act and the due process clause of the Fifth Amendment.

The evidence excluded on this point has been heretofore described. See p. 1, supra, this brief. The offers of proof, both oral and documentary, on this phase of the case are printed in full in the APPENDIX in the *Stull* case to which reference is here made. (Ap. S. pp. 11-42)

The Regulations, Section 623.1 (c), provide that in classifying a registrant "there shall be no discrimination for or against him because of his race, creed, or color, or because of his membership or activity in any labor, political, religious or other organization. Each registrant shall receive equal and fair justice."

It is admitted that the Nicholas County board was prejudiced against Stull. For this reason the Director transferred the file out of its jurisdiction after Judge Moore discharged Stull on a petition for writ of habeas corpus. This transfer was made mandatory under the provisions of Section 623.11, subsection (b).

It is fundamental that a hearing by a biased judge in a court is not in conformity with due process of law, as declared in *Jordan* v. *Massachusetts*, 225 U. S. 167. Cf. 28 United States Code Sec. 25. In the field of administrative law it has been repeatedly held that this rule applies to hearing officers of the administrative agencies. *Inland Steel Co.* v. *National Labor Relations Board*, 109 F. 2d 9; *Cupples Co.* v. *National Labor Relations Board*, 106 F. 2d 100; *Montgomery Ward & Co.* v. *National Labor Relations Board*, 103 F. 2d 147. "The commission is to be nonpartisan; and it must, from the very nature of its duties, act with en-

tire impartiality. It is charged with the enforcement of no policy except the policy of the law." (*Humphrey* v. *United States*, 295 U. S. 602, 624) See *Morgan* v. *United States*, 304 U. S. 1, 14-25, and especially at page 22 where the Chief Justice said: "The maintenance of proper standards on the part of administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority."

The evidence offered not only conclusively showed prejudice on the part of the Nicholas County local board, but also tended to prejudice and influence the appeal board. It should be noticed that the appeal board is the same one that had on two previous occasions given him a I-A classification. Furthermore, there are letters written by the Appeal Board that demonstrated prejudice, as well as the report of the Department of Justice hearing officer made to the appeal board. (See Ap. S. pp. 25-39.) The Regulations require that the draft boards "shall be careful to avoid the expression of any opinion concerning information in the registrant's file and should refrain from including any argument in support of its decision". (Reg. 627.13 (b))

The evidence excluded was relevant and material on the issues of prejudice on the part of the administrative agency's hearing officers and therefore it was error to exclude it from consideration of the jury.

EIGHT

This court should hold that the trial court erred in excluding oral testimony and documentary evidence offered by petitioners to show that the local boards had classified and dealt with them in an unconstitutional and unlawful manner, in failing to give the requested charges submitting these defenses and in charging the jury that petitioners could not challenge the validity of the classifications and induction orders and stating that the action of the local boards was binding upon the court and jury; therefore the court should exercise its discretion and grant the writs of certiorari.

For the purpose of showing that the administrative agency acted in excess of its authority and in an unconstitutional manner in dealing with each petitioner, in classifying and in ordering each petitioner to report for induction, there was offered certain oral testimony and documentary evidence. The documentary evidence consisted of affidavits, letters, statements and other written material contained in the file of each petitioner showing his status under the Act, his individual life's history and the history of his case before the administrative agency. (For statement of the evidence in the *Clayton* case, see petition for writ of certiorari, pp. 9-17. For statement of evidence in *Stull* case, see petition for writ of certiorari, pages 9-14.) Each petitioner also offered oral testimony concerning his full-time ministerial status and the time spent in and the nature of his ministerial duties showing that he stood in the same relation to Jehovah's witnesses as do the clergy of orthodox religious denominations.

All of the above evidence was excluded and in each case an exception allowed. The evidence was material and relevant to the issues raised upon the pleas of not guilty.

The oral evidence was admissible on the theory that the district court had the right to make a *de novo* inquiry into the constitutional questions raised as to the action of the administrative agency. The documentary evidence was considered by the administrative agency in arriving at each petitioner's classification. Being a part of the file of the administrative agency and having been considered by it, it was the duty of the court to permit each petitioner to introduce the file of the administrative agency in evidence so that the court and jury might consider and determine whether the administrative agency had acted in excess of its authority, contrary to the undisputed evidence, without substantial evidence, arbitrarily and capriciously and in a manner so as to violate the constitutional rights of the petitioners.

The trial court instructed the jury that the action of the administrative agency was binding upon the court and jury and that it could not be questioned in defense to the indictment. (Ap. C. pp. 25-30; Ap. S. pp. 50-52) Each petitioner duly objected to these parts of the court's charge. The objection was overruled with exception. (Ap. C. pp. 31-37; Ap. S. pp. 52-54)

Each petitioner duly and timely requested the court to charge the jury so as to inquire into whether or not the administrative agency had violated his statutory and constitutional rights. These numerous requests are set forth in the appendices and are referred to here. (Ap. C. pp. 38-71; Ap. S. pp. 49-50)

For the above and foregoing procedural errors the judgments of the court below should be reversed and new trials ordered.

NINE

This court should exercise its sound discretion and grant the writs of certiorari in both of these cases because the trial court committed reversible error in refusing the requested instructions duly presented by petitioners in which the jury would have been permitted to consider the good faith and honest belief of each petitioner that he was exempt as a minister of religion in defense to the indictment in determining whether he unlawfully, wilfully, knowingly and feloniously refused to perform a duty imposed under the Act.

Each petitioner duly and timely requested the court to charge the jury that they could consider the facts, circumstances and the good-faith, honest belief of the petitioner that he was a minister of religion exempt from duty for training and service in determining whether the petitioner had unlawfully, knowingly, wilfully and feloniously refused to report for induction. (See APPENDIX in the *Clayton* case pp. 43-44.) These same requested charges were duly tendered in the *Stull* case and appear in the transcript of the record and although not printed in the *Stull* APPENDIX are relied upon. In addition two other requested charges on the same subject matter were tendered to the trial judge and refused. (See APPENDIX in the Stull case, pp. 49-50.)

It is fundamental that all issues of fact to which applicable rules of law can be applied must be submitted to the jury. It is unnecessary to cite authority to support this proposition. The only question for determination is whether the issue of good faith and honest belief are matters of defense to an indictment charging willful violation of an administrative order. By force of the reason generated by this court in *United States* v. *Murdock,* 290 U. S. 389, there

can be little doubt about this being a substantial question. In the *Murdock* case the defendant was charged with unlawful evasion of the Internal Revenue Code and Regulations thereunder by failure to make a disclosure of certain items of income in the return filed with the Department. Upon a trial it also was disclosed that the defendant refused to answer questions about the matter upon a hearing conducted by the Department prior to the indictment. The defendant claimed that the items involved were exempt under the Code. It was held that the items were not exempt items as a matter of law, and that, although this defense fell as a matter of law, Murdock was nevertheless entitled to have the jury consider his belief and *bona fides* in determining whether he unlawfully and feloniously violated the law. The requested instruction raising the issue was refused. The Circuit Court of Appeals reversed the judgment because of the error of the district court in this regard. In the *Murdock* case this court said, "It follows that the respondent was entitled to the charge he requested with respect to his good faith and actual belief."

It seems clear that the action of the trial court in refusing the various requested charges is in conflict with the decision of this court in the *Murdock* case.

Conclusion

The arbitrary and unreasonable action of the administrative agency caused the trial judge to "unhesitatingly say" that petitioners were entitled to a ministerial classification and "to the same consideration at the hands of the draft boards as are ministers of the ordinary churches as we know them". This conviction of the trial judge impelled him in his discretion to make the sentence of each petitioner only *ten days*. Is not this alone an eloquent argument in favor of the right of a judicial review of the questions raised in defense to the indictment? Does not this demon-

strate that the law has been so grossly perverted that it causes the mind of an honest judge to rebel at the thought of its harsh consequences and impels him to bring the penalty for a violation of an act of Congress down to the level of a traffic-court offense? If they are guilty of such a small offense as to draw this light sentence, why, then, should they be denied the right to prove their innocence and to a full hearing in defense to the indictment?

Strangely enough, it is asserted that the nature of the alleged offense is of such a character that the usual criminal defenses must be supplanted by conclusive suppositions and presumptions of guilt. But before this alien precept is substituted in the place of established rules of criminal jurisprudence, let the warning words of Mr. Justice Story in his *Commentaries on the Constitution* (Vol. 2, p. 653) be considered:

"What is to become of constitutions of governments if they are to rest, not upon the plain import of their words, but upon conjectural enlargements and restrictions to suit the temporary passions and interests of the day. . . . They are not to be frittered away to please the demagogues of the day. They are not to be violated to gratify the ambition of political leaders; they are to speak the same voice now and forever."

The judiciary must be insensible to the many 'practical' arguments asserted as justification for denial of a defense to the indictment. "It is the unique function of this Court not to dictate policy, not to promote or oppose crusades, but to maintain the balance between States and Nation through the maintenance of the rights and duties of individuals." (Chief Justice Hughes on the occasion of the ceremonies in commemoration of the 150th anniversary of the first meeting of the Supreme Court, February 1, 1940.)

In refusing to consider 'practical' arguments against Jehovah's witnesses, the Florida Supreme Court declared: "These several arguments offered in behalf of the chal-

lenged ordinance are weighty and if presented to a legislative body could not only be influential but convincing, or if made on the hustings, would be approved and applauded by the people, but a court in the discharge of duty under our system is required to be oblivious to public clamor, partisan demands, notoriety, or personal popularity and to interpret the law fearlessly and impartially so as to promote justice, inspire confidence and serve the public welfare." *State ex rel. Wilson* v. *Russell,* 146 Fla. 539, 1 S. 2d 569 (1941).

In *Hovey* v. *Elliott,* 167 U. S. 409, at pages 413-418, Mr. Justice White declared: "[A] more fundamental question yet remains to be determined, that is, whether a court possessing plenary power to punish for contempt, unlimited by statute, has the right to summon a defendant to answer, and then, after obtaining jurisdiction by the summons, refuse to allow the party summoned to answer or strike his answer from the files, suppress the testimony in his favor, and condemn him without consideration thereof and without a hearing, on the theory that he has been guilty of a contempt of court. The mere statement of this proposition would seem, in reason and conscience, to render imperative a negative answer. The fundamental conception of a court of justice is condemnation only after hearing. To say that courts have inherent power to deny all right to defend an action and to render decrees without any hearing whatever is, in the very nature of things, to convert the court exercising such an authority into an instrument of wrong and oppression, and hence to strip it of that attribute of justice upon which the exercise of judicial power necessarily depends. . . . Can it be doubted that due process of law signifies a right to be heard in one's defense? If the legislative department of the government were to enact a statute conferring the right to condemn the citizen without any opportunity whatever of being heard, would it be pretended that such an enactment would not be violative of the Constitution? If this be true, as it undoubtedly is, how can it be

said that the judicial department, the source and fountain of justice itself, has yet the authority to render lawful that which if done under express legislative sanction would be violative of the Constitution? If such power obtains, then the judicial department of the government sitting to uphold and enforce the Constitution is the only one possessing a power to disregard it. If such authority exists, then in consequence of their establishment, to compel obedience to law and to enforce justice courts possess the right to inflict the very wrongs which they were created to prevent."

That an individual should be condemned as a felon, *attainted,* and his citizenship rights forfeited for the remainder of his life on earth, "without being accorded the opportunity of proving that the prosecution was based upon arbitrary and illegal administrative action, is not in keeping with the high standards of our judicial system. Especially is this so where neither public necessity nor rule of law or statute leads inexorably to such a harsh result. The law knows no finer hour than when it cuts through formal concepts and transitory emotion to protect unpopular citizens against discrimination and persecution. I can perceive no other course for the law to take in this case."—Mr. Justice Murphy, dissenting, *Falbo* v. *United States,* 320 U. S. 549, 561.

Respectfully submitted,

HAYDEN C. COVINGTON

Counsel for Petitioners

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586513—44

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 886

CHARLES MILBURN CLAYTON, PETITIONER

v.

UNITED STATES OF AMERICA

No. 887

THOMAS HOWARD STULL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners were separately indicted in the United States District Court for the Southern District of West Virginia for knowingly failing and neglecting to report for induction into the armed forces as required by orders duly issued to them by their local draft boards, in violation of the Selective Training and Service Act of 1940 (50 U. S. C. App. 301 *et seq.*) (No. 886, R.

1–2; No. 887, R. 1–2).[1] They each moved to quash the indictments (No. 886, R. 4–5; No. 887, R. 2–3) on the ground that the Act is unconstitutional because, *inter alia,* in its operation it constitutes a bill of attainder, transfers judicial power to the draft boards, and denies a defendant a judicial trial; the motions were overruled (No. 886, R. 6; No. 887, R. 4).

At petitioners' separate jury trials the court, relying upon the decision of this Court in *Falbo* v. *United States,* 320 U. S. 549, excluded evidence offered by them calculated to show that as Jehovah's witnesses they were ministers of religion and that the Selective Service boards acted arbitrarily and capriciously in denying them classification as ministers and classifying them for military service. The court accordingly instructed the jury in each case that the only issue for their determination was whether the petitioner knowingly failed to obey the order of his draft board to report for induction. (No. 886, R. 21, 29–30; No. 887, R. 40, 51–52.) Petitioners were each convicted (No. 886, R. 73; No. 887, R. 55) and sentenced to imprisonment for ten days (No. 886, R. 5–7; No. 887, R. 4–5). They were committed under these judgments and had served

[1] In a second count petitioner Clayton was also charged with knowingly failing to keep his draft board "notified as to his change in mailing address, presence and whereabouts" (No. 886, R. 2–3), but the trial court directed a verdict of acquittal on this count (R. 73).

their sentences prior to the hearing of their appeals in the Circuit Court of Appeals for the Fourth Circuit (No. 886, R. 78; No. 887, R. 58). That court, in a single *per curiam* opinion, affirmed the judgments of conviction upon the authority of the *Falbo* decision.

Since petitioners have fully served their sentences, it seems clear that these cases have become moot under the rule that the Court will not decide a question when there is no subject matter upon which its judgment can operate. *St. Pierre* v. *United States,* 319 U. S. 41. See also Brief for the United States, pp. 12–23, in the *St. Pierre* case, No. 687, October Term, 1942.

Pretermitting that question, however, petitioners are attempting to reargue substantially the same issues which were presented and decided in the *Falbo* case. Additionally, they contend (No. 886, Pet. 2, 18; No. 887, Pet. 2, 17–18) that they were improperly denied an opportunity at their trials to prove that they had no felonious intent by showing that they believed they were ministers of religion and as such entitled to exemption under Section 5 (d) of the Selective Training and Service Act.[2] However, Section 11 of the Act

[2] In the *Clayton* case, No. 886, however, the trial court permitted petitioner to explain in some detail that he considered himself to be a minister of religion within the exemption provided by Section 5 (d) and that for this reason he believed that the order to report for induction was unlawful (R. 17–22). In its charge to the jury the court adverted to

requires only a "knowing" failure or neglect to perform a duty required by the Act and the regulations issued under it. Petitioners do not deny that they intentionally failed to report for induction. In the circumstances their motives for their deliberate failure to report were of no significance. *Browder* v. *United States,* 312 U. S. 335, 340–341; *United States* v. *Illinois Central Railroad Company,* 303 U. S. 239, 242–243.

Petitioners' further contention (No. 886, Pet. 19–20; No. 887, Pet. 16–17) that the denial in a criminal prosecution for failure to report of an opportunity to challenge the propriety of the Selective Service classification constitutes the Act a bill of attainder, was argued at great length in the first petition for rehearing in the *Falbo* case which this Court denied on January 31, 1944. The point was also argued before the trial court in the *Clayton* case, No. 886, on a motion to quash and was properly overruled on the ground that the crime of failure to report, like any other crime, is punishable only upon conviction in a judicial trial (R. 7–11).

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this testimony and stated that the jury should consider it in determining whether petitioner knowingly refused to obey the order. The court also instructed the jury, however, that misunderstanding or ignorance of the law was not a defense to the prosecution. (R. 29.) Similar instructions were given in the *Stull* case, No. 887 (R. 51–52).

Accordingly, the petitions for writs of certiorari should be denied.

Respectfully submitted.

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